

EXHIBIT A

13:29:38

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 - - - - - X
 4 MOOG INC.,) 22-CV-187
 Plaintiff)
 5 vs.

6 SKYRYSE, INC., et al) Buffalo, New York
 Defendant.) August 4, 2022
 7 - - - - - X

DISCOVERY HEARING**Proceeding held via Zoom for Government Platform****All parties appeared remotely.****Transcribed from audio of Zoom for Government Platform**

10 TRANSCRIPT OF PROCEEDINGS
 11 BEFORE THE HONORABLE JEREMIAH J. MCCARTHY
 UNITED STATES MAGISTRATE JUDGE

12 FOR PLAINTIFF: SHEPPHARD MULLIN RICHETER & HAMPTON, LLP
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 LAI YIP, ESQ.
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 TRAVIS ANDERSON, ESQ.

-and-

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 16 BY: ROBERT J. FLUSKEY, JR, ESQ.
 PAULINE MUTO, ESQ.

17 FOR DEFENDANT: LATHAM & WATKINS, LLP
 18 BY: DOUGLAS E. LUMISH, ESQ.
 GABRIEL S. GROSS, ESQ.
 19 KELLEY STOREY, ESQ.
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FOR DEFENDANT

23 PILKINGTON/KIM: WINGET, SPADAFORA & SCHWARTZBERG, LLP
 BY: ALEXANDER ASHER TRUITT, ESQ.
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1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

2 P R O C E E D I N G

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MAGISTRATE JUDGE MCCARTHY: Good afternoon,
everyone, or good morning and good afternoon, I should
say.

MR. GROSS: Good morning.

MS. ANDOH: Good afternoon, your Honor.

MR. TRUITT: Good afternoon.

MAGISTRATE JUDGE MCCARTHY: Okay. Eric,
have we noted the appearances or go ahead and call the
case.

THE CLERK: I will, Judge. We're on the
record in civil proceeding 22-CV-187, Moog Inc v Skyryse
Inc., et al for oral argument. Present by video are
Rena Andoh, Kazim Naqvi, Lai Yip, Travis Anderson,
Pauline Muto, Tyler Baker, Robert Fluskey, Melissa
subject and Reena Dutta, are for Plaintiff Moog.

For Defendant Skyryse are Douglas Lumish,
Gabriel Gross, Ryan Banks, Arman Zahoory, Julianne
Osborne, Jerri Looney, Terrance Flynn, Cassandra Baloga
and Kelly Storey.

And for the individual Defendants are

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

12:58:49 2 Alexander Truitt, Anthony Green and Annabel Mirales.

12:58:56 3 The Honorable Jeremiah J. McCarthy
12:58:57 4 presiding.

12:58:58 5 MAGISTRATE JUDGE MCCARTHY: Okay. Welcome
12:59:00 6 again. And, as you know, we're going to discuss several
12:59:05 7 motions today, not all of the motions that are pending,
12:59:09 8 but the ones that I had indicated. And what I want to
12:59:13 9 do is segment the discussion. I want to begin with the
12:59:19 10 discussion of jurisdiction and venue, but solely for
12:59:26 11 purposes of the preliminary injunction motion, not for
12:59:31 12 purposes of the remainder of the case, because that
12:59:35 13 issue does not need to be decided right now. Next,
12:59:40 14 after that, I want to discuss the motions relative to
12:59:48 15 Pilkington and Kim's effort to claw back their devices
12:59:54 16 and Moog's motion for access to the devices. Following
13:00:00 17 that, we will discuss Moog's motion for clarification.
13:00:05 18 So, I assure you, I don't have total recall of
13:00:10 19 everything. But, I have spent a good deal of time
13:00:14 20 trying to get ready for today's argument. I have
13:00:17 21 reviewed the relevant papers in considerable detail and
13:00:23 22 I will do so again, but so as you argue, there is no
13:00:28 23 need to reinvent the wheel. If there is something I'm
13:00:32 24 not clear on, I will ask you. So, just hit the high
13:00:36 25 points, if you will.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:00:41 2 By the way, I thank counsel for yesterday's
13:00:45 3 e-mails responding to the question, the three questions
13:00:48 4 that I had posed last week. I have your responses and I
13:00:52 5 appreciate that. So, with the motions for dismissal or
13:00:59 6 transfer of venue, again, solely relative to where the
13:01:05 7 preliminary injunction motion is going to take place, I
13:01:09 8 will hear from whoever wants to be heard.

13:01:14 9 MR. GROSS: Thank you, your Honor. This is
13:01:16 10 Gabe Gross on behalf of Skyryse. Skyryse, of course, is
13:01:19 11 one of the Defendants who moved to dismiss for lack of
13:01:23 12 personal jurisdiction, lack of venue, and also in the
13:01:26 13 alternative to transfer the venue. I'll work to limit
13:01:31 14 my comments to I think what your Honor is most
13:01:34 15 interested in, which is whether these motions -- how
13:01:39 16 these motions affect the personal jurisdiction
13:01:42 17 proceedings. And the answer I think is that it is
13:01:46 18 entirely in the Court's discretion. Because the
13:01:49 19 Defendants' challenges to jurisdiction and venue were
13:01:54 20 preserved. They were not waived. They were not
13:01:57 21 forfeited. And that is the case ever since the first
13:02:00 22 stipulation the parties entered into in this case. This
13:02:04 23 has been, I think, the subject of the most recent debate
13:02:08 24 dispute between the parties, but it's helpful to go back
13:02:11 25 to April when this motion was filed, actually earlier,

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:02:15 2 March even, three weeks after the complaint was served,
13:02:20 3 Skyryse moved to dismiss the case on the pleadings for
13:02:23 4 lack of jurisdiction. And it did that at the very first
13:02:27 5 opportunity. And in the first few days of this lawsuit,
13:02:31 6 as your Honor is well familiar with, Skyryse and the
13:02:35 7 other Defendants, stipulated to some procedures to move
13:02:38 8 this case along subject to their challenges to the
13:02:41 9 Court's jurisdiction and to venue.

13:02:45 10 MAGISTRATE JUDGE MCCARTHY: You see me
13:02:48 11 looking away, I am paying attention, I'm just trying to
13:02:51 12 pull up some documents that I have on my desk, so go
13:02:55 13 ahead.

13:02:55 14 MR. GROSS: Okay. Thank you, your Honor.
13:02:57 15 The stipulations that are at issue are on the Court's
13:03:00 16 docket at ECF 25 and 33. I know the Court is familiar
13:03:05 17 with them by now. But they did a number of things.
13:03:09 18 They addressed the urgency that Moog claimed it needed
13:03:13 19 relief and stipulated to some processes to move this
13:03:16 20 case forward while the Defendants preserved their right
13:03:19 21 to challenge jurisdiction and venue. And the parties
13:03:23 22 collectively said so in the first stipulation ECF 25.
13:03:31 23 The parties were very clear that the Defendants had
13:03:33 24 consented to jurisdiction and venue only for the
13:03:36 25 purposes of that stipulation. They said that, again, in

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:03:39 2 ECF 33, and said that they specifically were reserving
13:03:45 3 the right to challenge jurisdiction and venue. And it
13:03:50 4 was only a couple weeks after that that the motion came
13:03:53 5 in, Skyryse filed its motion, so did the individual
13:03:57 6 Defendants to dismiss the case on these jurisdictional
13:04:00 7 and venue grounds. And then in opposing that motion
13:04:04 8 back in April, Moog itself recognized in its opposition
13:04:08 9 that the Defendants had preserved these rights. It
13:04:12 10 argued that the preservation was unequivocal or
13:04:37 11 insufficient, but they acknowledged that the
13:04:40 12 preservation was there. And their argument to this
13:04:43 13 Court back then, in April, April 12th, was that if there
13:04:47 14 was a forfeiture, that was the term they used, in April,
13:04:51 15 if there was a forfeiture, it was by the Defendant's
13:04:54 16 counsel. That even though the Defendants in these
13:04:56 17 stipulations expressly put in a reservation of rights,
13:05:01 18 the mere conduct of acting to move this case forward
13:05:06 19 procedurally agreed to preserve evidence, exchange
13:05:08 20 information with the Plaintiff, agreed to procedures for
13:05:14 21 discovery of electronic information and a briefing
13:05:18 22 schedule for an upcoming preliminary injunction, they
13:05:22 23 said the act of entering into those stipulations and
13:05:24 24 then starting to work on those processes was a
13:05:27 25 forfeiture through conduct of its right that it tried to

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:05:31 2 preserve on the papers to challenge jurisdiction. We
13:05:34 3 address that in the reply briefing and explained that is
13:05:38 4 not the case. Look at the language of the stipulation.
13:05:41 5 There is no waiver. Both stipulations make clear that
13:05:45 6 the consent to jurisdiction for these early purposes was
13:05:48 7 limited just to the purposes of the stipulation itself.
13:05:51 8 And in arguing otherwise, Moog even complained to the
13:05:56 9 Court, I mean, it recognized the Court might reach the
13:05:58 10 jurisdiction issues before the PI hearing. And even
13:06:02 11 argued that one of the dangers to it was that, well, if
13:06:06 12 the case is transferred, for example, that would really
13:06:10 13 delay the preliminary injunction hearing. Moog was well
13:06:13 14 aware that neither, none of the parties tried to dictate
13:06:17 15 the order in which the Court would resolve these very
13:06:20 16 important motions. Moog was just as aware as Skyryse
13:06:24 17 and the other Defendants, the Court may reach the
13:06:27 18 jurisdictional and venue thresholds first and decide
13:06:30 19 them in the Defendants' favor rather than Moog's, which
13:06:34 20 could result in the preliminary injunction being heard
13:06:37 21 in another court the Central District of California
13:06:39 22 where, of course, every single witness, shred of paper
13:06:44 23 from the Defendants, piece of evidence, electronic
13:06:47 24 repository is located. So that was the status of the
13:06:51 25 dispute back in April. And then, of course, as your

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:06:55 2 Honor knows, the parties spent the last few months
13:06:58 3 exchanging information, going through the expedited
13:07:02 4 discovery while the motions were pending. And, of
13:07:04 5 course, that required a lot of time and attention from
13:07:07 6 everybody in this hearing. But the jurisdictional and
13:07:10 7 venue motions remained pending and remained briefed. It
13:07:17 8 was a couple weeks ago that, when your Honor let the
13:07:20 9 parties know that you intended to prioritize the
13:07:23 10 jurisdictional and venue issues, that Moog's position
13:07:28 11 changed. And we saw this in a couple of ways.

13:07:30 12 First, it came through in formal e-mails
13:07:33 13 with counsel and the Court. And Moog made an argument
13:07:35 14 we hadn't seen before, and one that, frankly, surprised
13:07:39 15 us. And it was an argument, not that Skyryse had
13:07:43 16 somehow, through its conduct in participating in good
13:07:46 17 faith in this litigation at the outset for discovery
13:07:49 18 purposes had forfeited its right to challenge
13:07:55 19 jurisdiction, but now they said Skyryse actually
13:07:59 20 explicitly waived its right to challenge the Court's
13:08:03 21 jurisdiction and venue or to move to transfer in those
13:08:27 22 stipulations. And I think, frankly, what inspired that
13:08:32 23 is the Court's renewed attention on those motions after
13:08:35 24 it shifted from administering discovery that the parties
13:08:39 25 had stipulated to.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:08:40 2 MAGISTRATE JUDGE MCCARTHY: Just bear in
13:08:42 3 mind that, up until that point, the motions had not been
13:08:46 4 assigned to me for decision. They were with Judge
13:08:53 5 Vilardo when he made the dispositive referral which
13:08:59 6 would include the jurisdictional motion. That is when I
13:09:02 7 thought, well, we ought to get this thing resolved
13:09:05 8 sooner rather than later because it deals with which
13:09:08 9 court is going to be hearing this. Go ahead.

13:09:13 10 MR. GROSS: We appreciate that you did, your
13:09:15 11 Honor. And I think it really goes to the point of
13:09:18 12 timing. The briefing on these motions originally
13:09:21 13 occurred in April shortly after the suit was filed, it
13:09:25 14 might have extended until May, but all of the briefing
13:09:28 15 was complete in the first six weeks or so of the
13:09:31 16 lawsuit. And until that dispositive motion referral and
13:09:34 17 we had guidance from your Honor all the parties knew is
13:09:38 18 that it could be decided any day. And I think that is
13:09:41 19 why Moog recognized in its first opposition brief there
13:09:45 20 have been others since, but in the first opposition
13:09:48 21 brief that the case could get transferred or dismissed
13:09:53 22 before the preliminary motion was heard.

13:09:56 23 MAGISTRATE JUDGE MCCARTHY: And I know there
13:09:58 24 may be reasons why you don't want to posture, Judge, but
13:10:02 25 did anybody ever say to Judge Vilardo, hey, Judge, this

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:10:05 2 is a foundational issue here as to which court is going
13:10:10 3 to hear this case, can you prioritize this. Did anybody
13:10:15 4 go to him and say that?

13:10:18 5 MR. GROSS: No, your Honor, I don't recall,
13:10:20 6 at least a filing to that point. But I do recall
13:10:25 7 language --

13:10:26 8 MAGISTRATE JUDGE MCCARTHY: Anybody talk to
13:10:30 9 his Chambers or anything because that would seem to me
13:10:33 10 that is before anything and everything else, that is
13:10:36 11 something that I would think all of the parties would
13:10:38 12 have wanted to have sorted out.

13:10:41 13 MR. GROSS: Well, I think, in retrospect,
13:10:43 14 that may have been a wise idea. I know there is always
13:10:46 15 a little bit of reluctance to pester a busy judge about
13:10:51 16 a motion that has been pending. So, no, we didn't do
13:10:55 17 that. But we did meet with him to discuss the status of
13:10:59 18 the case and the possible timing of the preliminary
13:11:02 19 injunction motion it may have come up at that
13:11:04 20 conference, but it wasn't in the form of a request that
13:11:07 21 you asked about.

13:11:07 22 MAGISTRATE JUDGE MCCARTHY: Why would you be
13:11:09 23 discussing with Judge Vilardo the timing of a
13:11:12 24 preliminary injunction motion if you didn't think the
13:11:14 25 motion was going to be heard here?

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:11:17 2 MR. GROSS: Well, your Honor, I think all
13:11:19 3 parties wanted some certainty and the, Judge, had raised
13:11:22 4 it, so we, of course, were going to discuss with the
13:11:25 5 Court our schedules and our client's availability, which
13:11:28 6 we did.

13:11:28 7 MAGISTRATE JUDGE MCCARTHY: Okay. Okay. Go
13:11:35 8 ahead.

13:11:35 9 MR. GROSS: Thank you, your Honor. So, the
13:11:36 10 argument that the parties have been having, your Honor,
13:11:39 11 has changed a little bit. In recent weeks, Moog's
13:11:43 12 forfeiture through conduct argument changed. They began
13:11:46 13 arguing that there was express waiver. There were
13:11:50 14 suggestions in the e-mail to your Honor and I think also
13:11:53 15 in the supplemental briefing that parties provided, at
13:11:59 16 your suggestion to update the Court about recent
13:12:04 17 happenings involving the Government investigation and
13:12:06 18 discovery, there has been a suggestion by Moog that,
13:12:09 19 well, Skyryse's first counsel of record, as your Honor,
13:12:14 20 I'm sure, remembers my firm and my colleagues
13:12:18 21 substituted in for another law firm, and the suggestion
13:12:20 22 was that Skyryse's first counsel of record, knowingly
13:12:24 23 waived these rights, and now Skyryse needs to be held to
13:12:28 24 that, and so does the new counsel. That just is,
13:12:33 25 frankly, wrong. The fact that there was a substitution

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:12:36 2 of counsel doesn't change the explicit language and
13:12:39 3 reservations of rights in the stipulations. If the
13:12:43 4 Court is inclined to consider it, we've provided
13:12:46 5 supplemental evidence from another of Skyryse's lawyers,
13:12:49 6 general counsel, Jerry Razlootny (phonetic), who has
13:12:55 7 been actively managing and instructing the outside firms
13:12:58 8 and was involved in the negotiations to describe how
13:13:02 9 they transpired and one of the things that the counsel,
13:13:05 10 did in negotiating the stipulations as you can imagine
13:13:08 11 is have back and forth about what provisions would be in
13:13:11 12 there. And there is a very clear record of Moog's
13:13:15 13 counsel proposing language by which the parties would
13:13:17 14 have agreed to defer any resolution of the
13:13:21 15 jurisdictional or venue challenges until after the
13:13:25 16 preliminary injunction motion was resolved and Moog
13:13:29 17 rejected that. Moog rejected that or, excuse me,
13:13:33 18 Skyryse rejected that. Skyryse rejected that in favor
13:13:37 19 of the language that the parties ultimately agreed upon
13:13:41 20 and put in the stipulation that was ultimately ordered
13:13:44 21 by the Court. So the suggestion that we've only heard
13:13:46 22 in recent weeks that there was an explicit waiver of the
13:13:50 23 right to challenge the Court's jurisdiction and venue
13:13:54 24 is, just frankly, counter factual. And, your Honor,
13:13:58 25 these are, of course, these issues have important due

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:14:02 2 process considerations. I have spent part of the
13:14:06 3 morning actually looking at maps. Moog's facility in
13:14:13 4 Torrance, California is about a half a mile from where
13:14:17 5 Defendant Kim lives. It's about a mile and a half from
13:14:21 6 where Defendant Pilkington lives. Skyryse is up the
13:14:58 7 road seven or eight miles in a town called /EL /SA gun
13:15:01 8 /TKA. This is all in the LA area near an airport where
13:15:05 9 there is a pretty established aerial space and aviation
13:15:36 10 industry and it's all within the Central District of
13:15:38 11 California. And all of the discovery virtually -- well
13:15:44 12 certainly from the Defendants, all of the discovery from
13:15:47 13 the Defendants has come out of that area. The people
13:15:49 14 live there, they work there. Moog's people live and
13:15:53 15 work there near Torrance, and non-parties who have
13:15:57 16 already been getting third-party subpoenas from Moog
13:16:00 17 live and work there. Moog hasn't taken any discovery
13:16:05 18 from New York, and, of course, has provided some, but
13:16:10 19 the vast majority of the facts, the witnesses, the
13:16:13 20 evidence, the testimony that is going to be elicited in
13:16:16 21 this case is coming from the Central District of
13:16:19 22 California.

13:16:20 23 So, there has been no waiver, your Honor.
13:16:23 24 There has been no forfeiture. Skyryse has done its
13:16:29 25 level best because Moog came to this Court with its hair

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:16:33 2 on fire claiming to need immediate, immediate, emergency
13:16:37 3 relief, and Skyryse has done its level best to work with
13:16:41 4 them in good faith to agree to preserve all evidence, to
13:16:45 5 start an exchange of information, to adopt the neutral
13:16:49 6 third-party protocol, that was all procedural and all of
13:16:52 7 it was subject to its reservation of rights to contest
13:16:55 8 the Court's jurisdiction and venue. The motion that
13:17:00 9 Skyryse filed was at the earliest possible moment, 21
13:17:04 10 days after being even served with the complaint and
13:17:07 11 started this significant process of working with Moog
13:17:10 12 and its counsel to get them what they claimed to have
13:17:13 13 needed.

13:17:14 14 And, your Honor, I think you know, as I
13:17:16 15 think about the question that you asked me before, why
13:17:20 16 haven't the parties or the counsel been asking the Court
13:17:22 17 to get this motion resolved. I think, frankly, part of
13:17:26 18 the answer is that the urgency has subsided. Moog
13:17:30 19 demanded emergency relief, and then it got it by
13:17:34 20 stipulation. And I don't -- and we -- the date for the
13:17:39 21 hearing in October was so far out when the
13:17:45 22 jurisdictional and venue motions were filed, that I,
13:17:48 23 frankly, don't think it was likely that there was going
13:17:51 24 to be an issue getting these all resolved in a timely
13:17:54 25 fashion, and, in particular, you know, once the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:17:56 2 emergency had subsided. So, as your Honor knows, some
13:18:01 3 other things have happened that we think support both
13:18:05 4 dismissal or transfer in the alternative. That
13:18:10 5 demonstrate the many substantial connections between
13:18:14 6 this suit and what would be the transferee court in the
13:18:17 7 Central District of California. I won't get into those
13:18:20 8 right now because I don't think they go right to your
13:18:23 9 question of whether the preliminary injunction hearing
13:18:25 10 would be affected here. But if the Court were to grant
13:18:28 11 either the motion to dismiss for lack of personal
13:18:31 12 jurisdiction or lack of proper venue or transfer the
13:18:34 13 case and do that in the near term, then, yes, that would
13:18:38 14 resolve in a preliminary injunction hearing if Moog
13:18:41 15 keeps its motion on file being heard by that court.
13:18:44 16 And, frankly, I don't -- we don't know what Moog will
13:18:48 17 do, because it has all of the relief and it has admitted
13:18:51 18 in the papers to your Honor that it received the
13:18:54 19 emergency relief, the preliminary relief it requested
13:18:57 20 via stipulation. So it's a little unclear as to what
13:19:00 21 relief it will be seeking, if any, in a preliminary
13:19:04 22 injunction. So, your Honor, I think the Court has broad
13:19:21 23 authority and discretion to decide these motions now.
13:19:27 24 Skyryse certainly has not forfeited. It has not waived
13:19:30 25 its right. We have ample evidence on that point before

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:19:33 2 you including the declaration of Ms. Loony, if the Court
13:19:37 3 is inclined to consider it. And I don't think there
13:19:41 4 will be any prejudice that it is material or undue to
13:19:44 5 either of the parties if the case is transferred. The
13:19:47 6 evidence has been preserved by stipulation. Discovery
13:19:51 7 is underway by stipulation. Moog has the preliminary
13:19:55 8 relief that it asked for by stipulation. If there is
13:19:59 9 any delay, if this case is transferred today, a court,
13:20:03 10 that because of its plethora of judges, its abundance of
13:20:09 11 judges, gets cases tried much sooner than this Court.
13:20:13 12 If the case is transferred or re-filed in that other
13:20:17 13 court, I think the parties will be able to keep it
13:20:19 14 moving along just as does this Court.

13:20:23 15 With that, I'll stop and I'm happy to answer
13:20:26 16 any questions that you have and then reserve time to
13:20:28 17 respond to whatever I hear from our colleagues.

13:20:32 18 MAGISTRATE JUDGE MCCARTHY: Before I hear
13:20:33 19 from counsel for Moog, Mr. Green or Mr. Truitt, do you
13:20:37 20 want to weigh in on this issue?

13:20:39 21 MR. TRUITT: Thank you, your Honor. And
13:20:40 22 I'll be brief. Just to touch on a few points, first
13:20:45 23 being that the individual Defendant's Rule 12 motion, it
13:20:50 24 didn't seek a carve out for the preliminary injunction
13:20:54 25 hearing to be heard. It sought dismissal of the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:20:56 2 complaint because this Court does not have jurisdiction
13:21:00 3 over the individual Defendants. And now we've seen
13:21:02 4 arguments from the Plaintiff that sound in waiver and
13:21:07 5 they sound in estoppel, but none of these arguments are
13:21:13 6 (inaudible.) The federal rules have very specific
13:21:17 7 Guidelines for when a waiver of a jurisdictional defense
13:21:20 8 may occur. It's federal Rule 12(h)(1). Federal Rule
13:21:26 9 12(h)(1) finds a waiver occurred if a responsive
13:21:28 10 pleading does not waive the argument that jurisdiction
13:21:31 11 doesn't exist. Here there has been no answer filed.
13:21:35 12 The first responsive pleading was the jurisdictional
13:21:38 13 motion to dismiss. So, the only other argument is that
13:21:42 14 perhaps estoppel might lead to some sort of forfeiture
13:21:46 15 of that defense. But estoppel cannot lie where there
13:21:50 16 has been an express reservation of rights. Now, the
13:21:54 17 stipulation contained an express reservation of rights
13:21:57 18 and then the motion to dismiss was filed. So, at no
13:22:00 19 point could Moog even establish any sort of reliance on
13:22:05 20 some sort of notion that the individual Defendants were
13:22:07 21 waiving jurisdiction because they reserved it every step
13:22:11 22 of the way and then they filed a motion to dismiss for
13:22:15 23 lack of personal jurisdiction or to change venue.

13:22:20 24 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
13:22:23 25 you. Who wishes to be heard on Moog's behalf?

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:22:28 2 MS. ANDOH: I do, your Honor. It's Reena
13:22:31 3 Dutta with Hodgson Russ.

13:22:34 4 MAGISTRATE JUDGE MCCARTHY: Ms. Dutta.

13:22:37 5 MS. DUTTA: Your Honor, I think we would
13:22:38 6 point to the language of the March 11th stipulation. I
13:22:40 7 don't think you need to get into Skyryse's supplement
13:22:44 8 briefing or filing. It very plainly says: "By agreeing
13:23:03 9 to this stipulated order, Defendants consent to the
13:23:06 10 jurisdiction and venue of this Court for purposes of
13:23:08 11 this stipulated order only and for no other purpose."
13:23:12 12 And then paragraph 12, which states: "This stipulated
13:23:15 13 order shall remain in effect until a hearing on
13:23:19 14 Plaintiff's motion for preliminary injunction takes
13:23:22 15 place and a final ruling on the merits, if issued."

13:23:25 16 And, as you, your Honor, pointed out
13:23:28 17 yourself, paragraph 10 of that same order expressly has
13:23:32 18 a date for the preliminary injunction hearing at a date
13:23:36 19 and time of this Court's choosing, this Court, that is
13:23:40 20 what they agreed to. There is no other reading of this
13:23:43 21 stipulation, your Honor. And Skyryse's counsel, in
13:23:46 22 their supplemental briefing and here today continually
13:23:51 23 refer to this as procedural, procedural stipulation,
13:23:54 24 procedural matters. This stipulated order addressed
13:24:24 25 Moog's motion for a temporary restraining order. This

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:24:28 2 is substantive relief in this order, including

13:24:31 3 Defendant's agreeing not to use access, disclose any of

13:24:35 4 Moog's non-public information. It's simply incorrect to

13:24:41 5 state that this was a procedural order governing

13:24:44 6 procedures. It's not --

13:24:46 7 MS. DUTTA: I apologize, Judge.

13:24:48 8 MAGISTRATE JUDGE MCCARTHY: That's okay.

13:24:51 9 MS. DUTTA: One additional thing, your

13:24:52 10 Honor. We don't think you need to consider Skyryse's

13:24:56 11 supplemental briefing or Ms. Loony's declaration. But,

13:25:14 12 to the extent you do, your Honor, we ask for the chance

13:25:17 13 to respond because we think Ms. Loony leaves out a

13:25:20 14 significant communication after the red line she

13:25:23 15 addresses, which she notes in her declaration occurred

13:25:26 16 on March 10th. There was a subsequent communication on

13:25:29 17 March 11th in which that paragraph 12 of the stipulated

13:25:33 18 order was inserted into the order, which it is now.

13:25:37 19 So, your Honor, we think that, again,

13:25:38 20 supports our argument that this is what the parties

13:25:41 21 agreed to at the time.

13:25:42 22 MAGISTRATE JUDGE MCCARTHY: Okay. Thank

13:25:44 23 you.

13:25:45 24 Mr. Gross, you said you wanted to reserve

13:25:48 25 briefly?

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:25:49 2 MR. GROSS: Thank you, your Honor. And I
13:25:50 3 will be brief. To Ms. Dutta's point --

13:25:53 4 MAGISTRATE JUDGE MCCARTHY: Let me just say.
13:25:55 5 Counsel, several of you, a couple of you said, "I will
13:26:00 6 be brief." I used to practice, too. I said I would be
13:26:04 7 brief and I never met it. But I'll take it for what
13:26:07 8 it's worth.

13:26:08 9 MR. GROSS: Okay. I'm going to be good to
13:26:10 10 my word. I will be good to my word.

13:26:12 11 MAGISTRATE JUDGE MCCARTHY: Okay.

13:26:12 12 MR. GROSS: To Ms. Dutta's point that the
13:26:15 13 parties stipulated that their arrangements reflected in
13:26:19 14 those stipulations would be in effect until the
13:26:21 15 preliminary injunction ruling, that is still the case.
13:26:24 16 Skyryse plans to abide by everything in there. I mean,
13:26:27 17 obviously, the scheduling might be subject to, as it
13:26:30 18 already has been, to a change in circumstances, but
13:26:34 19 Skyryse has preserved all of its evidence. Skyryse
13:26:38 20 never wanted or needed any Moog information and
13:26:41 21 continues to agree that it's not going to use that.
13:26:44 22 There is no relief that Skyryse is trying to seek from
13:26:48 23 these stipulations they can remain in place and enforce
13:26:51 24 as orders of the Court, at least until they change for
13:26:56 25 some reason even after a transfer to another court.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:26:59 2 And, finally, I wanted to finish with
13:27:02 3 pointing out, look it, if Moog really believed that the
13:27:06 4 preliminary injunction motion had to be heard and could
13:27:09 5 only be heard before these motions were resolved, it
13:27:14 6 would have said that in its first opposition. It
13:27:16 7 wouldn't have said the opposite, that, hey, if you grant
13:27:19 8 the motion and the case goes to another court, that is
13:27:22 9 going to delay our preliminary injunction hearing. So
13:27:26 10 the position that Moog has taken in recent weeks, I
13:27:29 11 think, are situational. And what we see in the original
13:27:32 12 briefing is truer to what the parties intended in the
13:27:38 13 stipulation.

13:27:38 14 Thank you, your Honor.

13:27:39 15 MAGISTRATE JUDGE MCCARTHY: Thank you all.

13:27:43 16 MR. TRUITT: Your Honor, may I be brief?

13:27:44 17 MAGISTRATE JUDGE MCCARTHY: Mr. Truitt, go
13:27:44 18 ahead.

13:27:46 19 MR. TRUITT: I think there was original
13:27:49 20 language in the first stipulation that I would like to
13:27:51 21 emphasize. The first is which, one, is it, I think,
13:27:54 22 documents 33 and 25 both say for the purpose of the
13:27:58 23 stipulation and no other purpose. So, I respectfully
13:28:03 24 submit that Skyryse -- I'm sorry -- that Moog is arguing
13:28:07 25 that a stipulation to adjourn now suddenly puts the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:28:11 2 entire proceeding within the Court's jurisdiction. I
13:28:15 3 would submit that is another purpose.

13:28:19 4 Second, document 33 says any and all
13:28:22 5 challenges to jurisdiction or venue in the Western
13:28:25 6 District of New York are expressly preserved. That is
13:28:28 7 what is happening with these Rule 12 motions. There are
13:28:31 8 challenges to the jurisdiction and venue of the Western
13:28:34 9 District of New York. Thank you.

13:28:35 10 MAGISTRATE JUDGE MCCARTHY: All right.
13:28:36 11 Thank you, counsel.

13:28:39 12 I've given a lot of thought to this and I
13:28:42 13 suppose, in one sense, which forum will hear the
13:28:52 14 preliminary injunction motion is not something that
13:28:56 15 needs to be decided now, because however you slice it,
13:29:01 16 it's probably a ways down the road. Nonetheless, to
13:29:05 17 avoid any confusion and to give the parties an
13:29:09 18 opportunity to seek review by Judge Vilardo, if they
13:29:14 19 wish, I'm going to tell you my thoughts and what I am
13:29:19 20 going to do on this issue and on the other issues we're
13:29:24 21 going to be discussing today, is, I will tell you what
13:29:27 22 my ruling is going to be, at least on most of them. And
13:29:31 23 then I will issue, in the next few days, a written
13:29:36 24 decision further explaining my reasoning.

13:29:41 25 First of all, I recognize that Skyryse, I

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:29:47 2 believe, two days ago has filed a motion for leave to
13:29:52 3 submit a supplemental reply pointing to prior
13:29:57 4 negotiations as indicating that the parties never
13:30:05 5 consented to have the jurisdiction or the preliminary
13:30:09 6 injunction motion considered in this court. If I were
13:30:14 7 to conclude that the -- that the two stipulated orders,
13:30:21 8 dockets 25 and 33, were ambiguous in that regard, I
13:30:27 9 would allow that submission and I would give Moog a
13:30:31 10 further opportunity to reply to it. However, I do not
13:30:36 11 find that the two stipulations, dockets 25 and 33, are
13:30:42 12 ambiguous in that regard, and, therefore, I don't see
13:30:47 13 any need or basis to consider evidence of prior
13:30:52 14 negotiations. The question is not what the parties may
13:30:57 15 have intended, but what they said. And I think, in
13:31:00 16 context, they clearly said that the preliminary
13:31:07 17 injunction hearing would take place here rather than in
13:31:11 18 another court. They consented to the jurisdiction and
13:31:14 19 venue of this Court for purposes of the stipulated
13:31:18 20 order. And one of the purposes of the stipulated order
13:31:22 21 was the scheduling of a preliminary injunction hearing.
13:31:27 22 There would be no point to talking about scheduling a
13:31:31 23 preliminary injunction hearing. In fact, they did
13:31:37 24 schedule the preliminary injunction hearing subject to
13:31:40 25 the Court's availability. But, there would be no point

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:31:44 2 in talking about that if this were not the Court that
13:31:47 3 was going to conduct the hearing. That, in a nutshell,
13:31:51 4 is my reasoning. I think it's the only fair reading
13:31:59 5 that can be given to the two stipulations and orders,
13:32:03 6 and, therefore, I think that, irrespective of where the
13:32:06 7 rest of the case will be conducted, the preliminary
13:32:11 8 injunction hearing should take place in the Western
13:32:15 9 District of New York. I will elaborate on that in more
13:32:21 10 detail in my written decision. Having said that,
13:32:25 11 though, I want to offer a few other observations.
13:32:29 12 First, with respect to the remainder of the case, and
13:32:31 13 that is not something that I'm going to be deciding
13:32:33 14 today, but if and when that issue has to be decided,
13:32:40 15 even if there is personal jurisdiction over the
13:32:43 16 remainder of the case, and I don't say whether there is
13:32:47 17 or not, based on what I've seen, I think there is a
13:32:52 18 compelling case or argument to be made that the
13:32:55 19 remainder of the case should be transferred to the
13:32:59 20 Central District of California based on convenience of
13:33:03 21 the parties, convenience of witnesses, coupled with the
13:33:06 22 fact that there is now an ongoing criminal investigation
13:33:11 23 in the Central District of California. Again, to be
13:33:14 24 clear, I'm not deciding that issue right now. That
13:33:17 25 might be affected by, you know, what occurs between now

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:33:20 2 and the time of the preliminary injunction hearing and
13:33:23 3 how familiar this Court has become with the issues;
13:33:26 4 vis-à-vis, court in the Central District of California.
13:33:31 5 I will just say that the parties should keep in mind the
13:33:35 6 possibility, at least, which I consider to be more than
13:33:38 7 a minimal possibility, that irrespective of where the
13:33:42 8 preliminary injunction is heard, the remainder of the
13:33:49 9 case may well be transferred to the Central District of
13:33:52 10 California. I also want to point out for Moog's
13:33:55 11 benefit, and I think, Mr. Gross, you alluded to this,
13:33:58 12 but we did a little checking on our own, and I don't say
13:34:02 13 this to shirk any responsibility, because I will not be
13:34:06 14 the one conducting the preliminary injunction hearing,
13:34:10 15 in any event, but in this district, in Buffalo, we have
13:34:15 16 two active district judges, Judge Vilardo and Judge
13:34:20 17 Sinatra. In the Central District of California -- we
13:34:22 18 also have, in fairness, we have two senior status
13:34:26 19 district judges, God bless them, Judge Arcara and Judge
13:34:31 20 Skretny, who are basically working full time. But by
13:34:35 21 contrast, the Central District of California has, I
13:34:37 22 believe, 34 district judges. So, in terms of how
13:34:45 23 quickly a preliminary injunction hearing could be
13:34:48 24 scheduled, I think there is a good argument that you
13:34:50 25 might get to a hearing more quickly in the Central

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:34:55 2 District of California than you would here.

13:34:57 3 Nonetheless, I think there is a contractual basis for
13:35:01 4 holding the hearing here, and so that will be my ruling.
13:35:07 5 If Judge Vilardo wants to take a different view of it,
13:35:10 6 well, that certainly is his prerogative.

13:35:15 7 Let's move on now to the companion motions
13:35:20 8 of -- and just to be clear, for that reason, I am also
13:35:25 9 denying Skyryse's motion to submit a supplemental reply
13:35:31 10 brief, which is docket No. 247, I believe. That will
13:35:36 11 obviously be part of the record if somebody wants to
13:35:41 12 make further argument to Judge Vilardo and if he wants
13:35:44 13 to consider it, I presume he would give, at that point,
13:35:48 14 would give Moog an opportunity to reply to that. But
13:35:52 15 that would be his call.

13:35:55 16 Let's turn then to the -- the motions -- the
13:36:00 17 claw back motions and Moog's motion for access to the
13:36:04 18 individual Defendant's devices. And I'll hear from
13:36:09 19 whoever wants to be heard in that regard.

13:40:16 20 MR. FLUSKEY: Your Honor, I can begin on the
13:40:18 21 restoration, if that is acceptable to the Court.

13:40:20 22 MAGISTRATE JUDGE MCCARTHY: Okay, Rob. Go
13:40:24 23 ahead.

13:40:24 24 MR. FLUSKEY: So, your Honor, there are at
13:40:40 25 least five independent bases that we think compels

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:40:54 2 restoration of Moog's access. And I, hopefully quickly,
13:40:59 3 I would like to march through each. The first is a
13:41:02 4 process point, but it's an important process point. The
13:41:06 5 Court should simply not permit its individual
13:41:09 6 Defendant's ability of self help. The individual
13:41:13 7 Defendants were required to turn over access to these
13:41:16 8 devices under two court orders. They had an opportunity
13:41:20 9 to seek relief from those orders. But rather than to do
13:41:25 10 that, they unilaterally cut off access and took it upon
13:41:29 11 themselves to suspend their performance under those
13:41:33 12 orders. That simply should not be condoned. We think
13:41:37 13 on that basis alone, the issue could be resolved. But,
13:41:42 14 there are other reasons. Second, the protective order
13:41:47 15 in this case provides absolutely no basis for the claw
13:41:51 16 back of the protective order is one of the principal
13:41:55 17 arguments or principal bases that the individual
13:41:57 18 Defendants cite, but it doesn't apply here. First, the
13:42:02 19 clawback provisions don't apply to Fifth Amendment
13:42:06 20 invocations. They apply to attorney work product and
13:42:10 21 attorney/client privilege. But even if it did, even if
13:42:14 22 the protective order or clawback provisions could apply
13:42:18 23 to a Fifth Amendment invocation, those revisions haven't
13:42:22 24 been triggered here because the individual Defendants
13:42:25 25 have not invoked Fifth Amendment rights. Moog has said

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

13:42:28 2 that a lot in its brief, and we said it a lot on
13:42:32 3 purpose. Because it's a threshold issue. There has
13:42:35 4 been no invocation of the Fifth Amendment here. There
13:42:38 5 has been participation in discovery, written document
13:42:43 6 responses, written RFAs, no assertion of the Fifth. And
13:42:47 7 the individual Defendants can't have it both ways. They
13:42:51 8 have a decision to make. They either invoke the Fifth
13:42:53 9 and deal with the consequences that that invocation may
13:42:57 10 bring, perhaps an adverse inference for them and/or
13:43:03 11 Skyryse, or they participate in discovery in full. They
13:43:08 12 can't hold up Moog's access to these devices based on
09:10:04 13 the specter of a potential inchoate Fifth Amendment
09:10:39 14 invocation. That is not how it works.

09:10:42 15 Now, if there were any doubt about this, a
09:10:45 16 quick walk through of the protective order, I think
09:10:48 17 makes it clear, which is docket No. 89, your Honor. So
09:10:53 18 Section 16.1 of the protective order governs claw back
09:10:58 19 of privileged material, and it reads to claw back
09:11:01 20 privileged material produced inadvertently, the
09:11:05 21 producing party must provide notice in writing to the
09:12:23 22 preceding party. So, in order for this provision to
09:12:26 23 apply, two things must be in place. We must be dealing
09:12:29 24 with privileged material and the production must have
09:12:34 25 been inadvertent. Neither element is satisfied here.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:12:38 2 Privileged material, capital P, capital M, is defined in
09:13:12 3 section 1.15. Privileged material means discovery
09:13:18 4 material protected from disclosure under attorney/client
09:13:24 5 privilege, attorney work product doctrine, United States
09:14:00 6 foreign bank, disclosure laws or regulations and any
09:14:04 7 other applicable foreign statute, law or regulation.

09:14:15 8 There has been no invocation of any privilege here. So
09:14:19 9 we're not dealing with privileged material, capital P
09:14:22 10 capital M. Nor are we dealing with an inadvertent
09:14:29 11 production. As we discussed at our last conference,
09:14:37 12 these devices were made available to Moog, it wasn't an
09:14:43 13 accident. Access was provided and then cut off. This
09:14:47 14 isn't a situation where you had 20 associates reviewing
09:14:50 15 documents in a database and five privileged documents
09:14:55 16 slipped through. This is not an inadvertent production.
09:15:45 17 Unless there were any doubt, section 11.1 of the
09:15:50 18 protective order, also supports Moog's position. 11.1,
09:15:54 19 which is under the heading "inadvertent production of
09:16:49 20 privileged or otherwise protected material," reads "When
09:16:53 21 a producing party gives notice to receiving parties that
09:16:57 22 inadvertent produced material is subject to a claim of
09:17:01 23 privilege or other protection, the obligation to the
09:17:07 24 receiving parties are those set forth in Federal Rule
09:17:12 25 26(b)(5)(B). Again, there has been no invocation of any

MOOG, INC. VS. SKYRYSE, INC. ET AL.

privilege here, so we're not dealing with information that is "subject to a privilege or other protection. So, again, point two, the protective order simply provides no basis for the claw back.

Point three, and I should say the next three points I'm going to address presuppose there has been an invocation of the privilege. So, in some respects, this is hypothetical, but the issues have been addressed in the brief, so I think they should be addressed here. Point three is this, the Fifth Amendment doesn't apply here in the first instance. So, the Fifth Amendment is principally a testimonial privilege. Now, the Fifth Amendment can apply in narrow circumstances to the act of producing documents if that act itself is tantamount to a testimonial admission. It's the Act of Production Doctrine. But the Fifth Amendment can't attach if the location and existence of the materials at issue are a foregone conclusion. The case law refers to this as the foregone conclusion exception. Here the existence and location of the information at issue is unquestionably a foregone conclusion. There is no dispute that when the individual Defendants left Moog and went to Skyryse, they possessed Moog's confidential information. How do we know that? They admitted it in response to RFAs. So

MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:21:18 2 attached to my declaration, your Honor, docket No.
09:21:25 3 228-3, we include examples of the discovery that the
09:21:28 4 individual Defendants participated in in this case. It
09:21:33 5 includes responses to requests for admissions. Both
09:21:37 6 Pilkington and Kim were asked, and I'll read the
09:21:40 7 Pilkington example, "admit that Pilkington retained
09:21:48 8 possession of Moog confidential information upon
09:21:50 9 beginning his employment at Skyryse. There are some
09:21:53 10 objections on ambiguity, no objection on Fifth
09:22:02 11 Amendment. And the answer is "Mr. Pilkington admits
09:22:08 12 that he had possession of some of Moog's information and
09:22:11 13 documents, files and data that were non-public,
09:22:16 14 proprietary and confidential, including source code when
09:22:19 15 he began his employment at Skyryse. The fact that the
09:22:22 16 individual Defendants possessed this information on
09:22:26 17 these devices is a foregone conclusion, it's not in
09:22:30 18 dispute. So the Fifth Amendment here wouldn't apply in
09:22:32 19 the first place. The act of producing this information
09:22:35 20 or providing access to it would be an act of surrender,
09:22:39 21 not a testimonial act. And, your Honor, we cite a case
09:22:42 22 that is instructive on this in our brief, *Burt Hill v*
09:22:50 23 *Hassan*, and the facts are very similar where the
09:22:55 24 Defendants sought to prevent disclosure of electronic
09:22:59 25 devices is fighting the Act of Production Doctrine under

MOOG, INC. VS. SKYRYSE, INC. ET AL.

the Fifth Amendment. The Court denied the Defendants' attempt at invocation, citing the fact that the Defendants in that case had already had admitted possession of the devices and had provided access to them. Same facts here. One difference between our case and Burt Hill, of course, is that in Hill, the Defendants actually invoked. So, the situation we have here is even stronger, stronger in favor of rejecting any hypothetical invocation of the Fifth Amendment privilege.

Your Honor, point four, even if the individual Defendants invoked, and even if the Act of Production Doctrine could apply, the Defendants have waived. The timeline is now clear, and I think undisputed. And on page 7 of Moog's brief docket, No. 228-1, we provide a table with what we consider to be an indisputable comprehensive timeline. On June 10, the individual Defendants were informed that the FBI was asking Moog for transcripts from this case. We now know on June 15, the individual Defendants received a grand jury subpoena and hired criminal defense counsel shortly thereafter. In mid June, between June 23, June 24, there was an exchange of discovery communication where Skyryse was insisting that Moog produce its

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:29:42 2 communications with the FBI. Moog agreed. Then on June
09:29:47 3 29, access to the devices at issue was provided. So 20
09:29:51 4 days after the June 10 letter where Moog advised the
09:29:56 5 Court and all counsel that the FBI was investigating
09:29:59 6 this case, and at least two weeks after the receipt of a
09:30:03 7 grand jury subpoena, the individual Defendants provided
09:30:09 8 access to the devices. When they provided access, they
09:30:15 9 knew full well what the potential criminal implications
09:30:20 10 of the civil case could be, in fact, I think it's pretty
09:30:23 11 clear they knew that in March when Moog filed the
09:30:27 12 lawsuit that accused them of theft under a statute that
09:30:31 13 carries criminal provisions. So, again, even if the
09:30:34 14 privilege could apply, it's been waived here. And a
09:30:39 15 subsidiary point, your Honor, is, there is no basis to
09:30:46 16 claw back information produced under the Fifth
09:30:50 17 Amendment. The individual Defendants do not cite a
09:30:54 18 single case where a court has allowed a Defendant, under
09:31:01 19 the citing the potential invocation of the Fifth
09:31:04 20 Amendment, to claw back materials that it's already
09:31:07 21 produced. And that is what we have here. We think it
09:31:11 22 would be unprecedented. We can't find a case where that
09:31:15 23 has happened.

09:31:16 24 Finally, your Honor, fifth point. The
09:31:19 25 individual Defendants continue to say that they need

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:31:21 2 further trade secret identification in order to decide
09:32:22 3 whether the Fifth Amendment applies. Your Honor, the
09:32:27 4 individual Defendants know all they need to know to make
09:32:30 5 that decision. How do we know that? They've invoked
09:32:33 6 the Fifth Amendment in response to the subpoena that
09:32:36 7 they've received from the Government. If they have
09:32:38 8 enough information to make the decision in that venue,
09:32:40 9 they can do it here. Your Honor has already ruled on
09:32:44 10 this issue. The Court has recognized that Moog's needs
09:32:50 11 additional further access to these devices to make its
09:33:30 12 additional trade secret identification. And individual
09:33:34 13 Defendants have failed to explain why they need that
09:33:39 14 information in order to make this invocation decision.

09:33:44 15 Your Honor, for those reasons, we think
09:33:46 16 access should be restored immediately so that we can
09:33:50 17 move forward with discovery leading up to the
09:33:53 18 preliminary injunction.

09:33:54 19 MAGISTRATE JUDGE MCCARTHY: Okay. So, Mr.
09:33:56 20 Fluskey, your argument addresses both opposing their
09:34:00 21 clawback motion and granting your motion for access,
09:34:04 22 correct?

09:34:05 23 MR. FLUSKEY: That is correct, Judge.

09:34:07 24 MAGISTRATE JUDGE MCCARTHY: Okay. All
09:34:08 25 right. Who wants to be heard on behalf of the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:34:11 2 individual Defendants?

09:34:16 3 MR. GREEN: It will be me, your Honor.

09:34:18 4 MAGISTRATE JUDGE MCCARTHY: Okay, Mr. Green.

09:34:20 5 MR. GREEN: Thank you. I think we have to
09:34:22 6 start with the protective order. And there was an
09:34:24 7 interesting truncation of what privileged material means
09:34:29 8 by Mr. Fluskey. He left off the end part of this that
09:34:34 9 it includes any other applicable United States or
09:34:37 10 foreign statute, law, regulation, privilege or immunity
09:34:42 11 from disclosure. That is the Fifth Amendment. That is
09:34:45 12 one of those privileges and immunities from disclosure.

09:34:49 13 MAGISTRATE JUDGE MCCARTHY: But, Mr. Green,
09:34:50 14 Section 16.5 of the protective order says that it's
09:34:56 15 operating pursuant to Federal Rule of Evidence 502(d)(3)
09:35:01 16 and Rule 502 expressly applies to only claw back of
09:35:08 17 attorney/client privilege and work product privilege.
09:35:13 18 It says nothing about Fifth Amendment privilege. How
09:35:16 19 does that protect you?

09:35:17 20 MR. GREEN: Well 16.1 uses the defined term
09:35:24 21 "privileged material." And as it was defined in the
09:35:26 22 protective order, that includes the Fifth Amendment
09:35:29 23 objection.

09:35:30 24 MAGISTRATE JUDGE MCCARTHY: All right. But
09:35:32 25 16.5, which allows to you claw back or says it's not a

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:35:37 2 waiver, expressly says pursuant to Federal Rule of
09:35:41 3 Evidence 502(d)(3) and that rule is limited to two
09:35:46 4 privileges: Attorney/client privilege and work product
09:35:49 5 privilege. So how can you use that to assert a basis to
09:35:53 6 claw back a Fifth Amendment -- something produced under
09:35:58 7 a Fifth Amendment privilege?

09:36:00 8 MR. GREEN: Because that is reading it out
09:36:02 9 of context.

09:36:05 10 MAGISTRATE JUDGE MCCARTHY: I'm just reading
09:36:06 11 what it says. I don't think that is out of context.

09:36:10 12 MR. GREEN: Well, that is just preserving,
09:36:12 13 that is just preserving against waiver. It's not saying
09:36:17 14 what you can and can't claw back. And the way
09:36:24 15 privileged material is defined, it would include
09:36:27 16 material that is protected by the Fifth Amendment. And,
09:36:34 17 I'd like to go on from there, which is there is also no
09:36:39 18 requirement in the protective order that we seek the
09:36:45 19 Court's approval before we provide notice to the
09:36:48 20 opposing party. All we're supposed to do is provide
09:36:52 21 notice and that is what we did. There is also no
09:36:57 22 requirement that we assert the Fifth Amendment privilege
09:37:01 23 at this point. The only issue is whether it is subject
09:37:06 24 to a claim of privilege and this material is subject to
09:37:12 25 a claim of privilege. And we would like to narrow that

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:37:17 2 down. But Plaintiff is not providing the information
09:37:22 3 that we need in order to do that. So, right now we're
09:37:36 4 stuck with a blanket assertion, but that is something
09:37:41 5 that we would like to cut down and our motion to stay
09:37:46 6 deals with that issue.

09:37:48 7 MAGISTRATE JUDGE MCCARTHY: Mr. Green, you
09:37:50 8 know, the complaint in the preliminary injunction
09:37:54 9 motion, rightly or wrongly, makes abundantly clear that
09:38:00 10 your clients are being charged with theft, with illegal
09:38:04 11 conduct. Why wouldn't you have been on notice at that
09:38:11 12 point that by producing the documents, there was at
09:38:15 13 least the potential of criminal implications? You don't
09:38:19 14 need a definition of what the trade secrets are. I
09:38:24 15 mean, at that point, you could have said, "we're not
09:38:28 16 producing anything based on the Fifth Amendment."

09:38:33 17 MR. GREEN: Well, when that happened, our
09:38:36 18 clients were not even represented by counsel. So --

09:38:39 19 MAGISTRATE JUDGE MCCARTHY: Well, they were
09:38:40 20 represented by counsel as of March 16th, docket No. 33,
09:38:52 21 which they were represented by previous counsel, but
09:38:57 22 they were represented by counsel. And that document,
09:39:00 23 the second stipulated order reaffirmed and incorporated
09:39:05 24 by reference all of the obligations of the initial
09:39:08 25 stipulated order, which is docket No. 25. So the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:39:12 2 argument that they weren't represented by counsel when
09:39:17 3 the production took place strikes me as less than
09:39:21 4 persuasive.

09:39:24 5 MR. GREEN: Well, the stip was signed before
09:39:27 6 they had counsel. And --

09:39:29 7 MAGISTRATE JUDGE MCCARTHY: No. The first
09:39:31 8 stip was signed before they had counsel. A few days
09:39:34 9 later, a second stip was signed by counsel, which
09:39:37 10 expressly reaffirmed all of the obligations of the first
09:39:42 11 stip. So, again, that, to me, doesn't move the needle,
09:39:51 12 as far as I'm concerned.

09:39:53 13 MR. GREEN: Well, your Honor, there are a
09:39:57 14 large number of cases, large number of civil cases that
09:40:01 15 if you really wanted to (inaudible) up and work and get
09:40:43 16 the prosecution involved, there could be a potential
09:40:47 17 criminal case. But here there is a lot that we did not
09:40:50 18 know. There was a lot that we did not know. We did not
09:40:53 19 know that the Plaintiff was instigating through
09:40:58 20 pre-complaint communications, a prosecution, against our
09:41:02 21 clients. We did not know how deeply involved the
09:41:05 22 Plaintiff was with that prosecution. Their meeting
09:41:09 23 biweekly, that they were providing them our information
09:41:13 24 and circumventing our Fifth Amendment rights in that
09:41:17 25 sense. And --

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:41:19 2 MAGISTRATE JUDGE MCCARTHY: You know, Mr.
09:41:20 3 Hunter said in his declaration in support of the
09:41:23 4 preliminary injunction motion, which was served on your
09:41:26 5 clients, I believe, on March 8th, he said, "I am going
09:41:30 6 to have to notify the Government, and based on my
09:41:32 7 experience, the Government doesn't take lightly to this
09:41:36 8 type of treatment of their information."

09:41:39 9 Now, I grant you that it appears that Moog
09:41:43 10 was in contact with portions of the government prior to
09:41:47 11 that time, but he made clear, I mean, there couldn't
09:41:51 12 have been any doubt after the date of your client's
09:41:55 13 receiving his declaration that the government would be
09:41:58 14 contacted and things might not go well, once the
09:42:03 15 Government was contacted. And, particularly, when your
09:42:07 16 clients are being charged with theft and illegal
09:42:12 17 conduct, I have difficulty seeing why a Fifth Amendment
09:42:18 18 alarm bells wouldn't be going off at that point.

09:42:22 19 MR. GREEN: Well, they've withdrawn the
09:42:24 20 claim that classified information and then let's even
09:42:27 21 look at that statement as your Honor noted.

09:42:30 22 MAGISTRATE JUDGE MCCARTHY: By the way,
09:42:31 23 where did they withdraw that? I know you made a
09:42:34 24 statement similar to that effect, but where?

09:42:37 25 MR. GREEN: I believe they withdrew it or

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:42:40 2 said that it doesn't exist anymore in their motion to
09:42:46 3 compel.

09:42:48 4 MAGISTRATE JUDGE MCCARTHY: Counsel, for
09:42:50 5 Moog, is that correct?

09:44:04 6 MR. TRUITT: I believe it was the motion to
09:44:08 7 stip.

09:44:11 8 MAGISTRATE JUDGE MCCARTHY: Okay. And just
09:44:18 9 can I hear from somebody on behalf of Moog and somebody
09:44:22 10 point me to a docket number.

09:44:27 11 MR. FLUSKEY: Your Honor, I confess, I don't
09:44:29 12 know if that is correct. If my other colleagues believe
09:44:32 13 that is correct or incorrect.

09:44:35 14 MS. ANDOH: Sorry, your Honor. Can somebody
09:44:37 15 please repeat the question, I probably can answer it.

09:44:39 16 MAGISTRATE JUDGE MCCARTHY: Mr. Green has
09:44:41 17 said that Moog has withdrawn its claim that confidential
09:44:46 18 information was taken.

09:44:48 19 MS. ANDOH: Confidential or classified?
09:44:50 20 Because I think that one of the issues here, your Honor,
09:44:53 21 is that they conflate those two categories of
09:44:57 22 information repeatedly in their brief. So, I want to
09:45:00 23 make sure that everyone is very clear about what the
09:45:02 24 allegations are and what they aren't. We allege that
09:45:05 25 confidential information was taken, and we also allege

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:45:08 2 that some of that information could rise to the level of
09:45:11 3 what the government calls "sensitive information" or
09:45:14 4 CUI. It's an abbreviation. What the complaint did not
09:45:19 5 allege or that we never have alleged is that classified
09:45:22 6 information was included in that complaint. And I will
09:45:24 7 say, your Honor, without making any waiver of privilege
09:45:27 8 or anything else, that had our internal investigation
09:45:31 9 indicated that there was classified information involved
09:45:33 10 in the theft, we would not have been able to proceed by
09:45:37 11 filing the complete file listing the way that we did in
09:45:41 12 connection of the civil complaint. There would have
09:45:46 13 been other procedures that would have needed to be
09:45:48 14 followed because there was classified information that
09:45:52 15 was implicated.

09:45:54 16 So, is there sensitive information involved?
09:45:57 17 Absolutely. Is there a very broad swath of information
09:46:01 18 that are specific to sensitive government programs?
09:46:05 19 Yes. Is any of that information that was taken
09:46:08 20 classified? To the best of our understanding and to the
09:46:11 21 best of our engagement on trying to determine this, the
09:46:14 22 answer is no, and we've never made that allegation.

09:46:17 23 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
09:46:17 24 you.

09:46:19 25 MR. GREEN: Well, they did imply that, and

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:46:24 2 at least imply, and at least in paragraph 244 of the
09:46:28 3 complaint, so I disagree that they haven't made that
09:46:31 4 allegation, but it's been withdrawn. And let's talk
09:46:35 5 about that statement, your Honor. As you noted, they
09:46:40 6 said, well, we might contact the Government. They
09:46:44 7 already were talking to the government. And there are
09:46:47 8 many trade secret cases, allegations of taking trade
09:46:54 9 secrets, where there is never any prosecution and we've
09:46:57 10 proceeded just along civil lines. There was no reason
09:47:00 11 for us to suspect that this would actually go to that
09:47:08 12 extreme. And I don't think it was warranted, either.
09:47:11 13 But, it has happened, we're aware of it now, and the
09:47:17 14 fact is we -- I would consider this an inadvertent
09:47:25 15 disclosure. When you ask what an inadvertent disclosure
09:47:29 16 is, you look at several factors the reasonableness of
09:47:32 17 the precautions used to prevent inadvertent disclosures.
09:47:38 18 Two, the time taken to rectify the error. Three, the
09:48:10 19 scope of the discovery and extent of the disclosure.
09:48:13 20 And, four, overarching issues of fairness.

09:48:16 21 Now, with number one, the reasonableness of
09:48:19 22 the precautions. We had a protective order in place
09:48:22 23 that provided for claw back. So, I think that is fairly
09:48:28 24 clear that we did have a reasonable precaution. Now,
09:48:32 25 the time taken to rectify the error. That is their main

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:48:37 2 point that I suppose we took too long. But the Second
09:48:45 3 Circuit has found that even six months is not too long
09:48:48 4 to assert the privilege. So, I don't believe that we
09:48:55 5 are considering the gravity of this.

09:49:01 6 MAGISTRATE JUDGE MCCARTHY: Mr. Green, let's
09:49:03 7 turn to what I consider to be another really, I guess,
09:49:07 8 foundational issue is here is do you have a Fifth
09:49:11 9 Amendment privilege at all?

09:49:14 10 MR. GREEN: Yes. Thank you.

09:49:15 11 MAGISTRATE JUDGE MCCARTHY: Were you
09:49:16 12 compelled to turn over these documents, these devices?
09:49:22 13 You turned them over pursuant to a stipulated orders
09:49:26 14 that you agreed to.

09:49:30 15 MR. GREEN: Yes, your Honor. But I don't
09:49:32 16 believe that that prevents us from asserting the
09:49:37 17 privilege. And --

09:49:39 18 MAGISTRATE JUDGE MCCARTHY: Well, the Fifth
09:49:41 19 Amendment protects only against compelled incrimination.
09:49:45 20 So, how were you compelled to turn these devices over?
09:49:49 21 You agreed to at the outset to the two documents, and,
09:49:54 22 granted, your clients were not represented by counsel
09:49:59 23 when the first document was signed, but they were when
09:50:02 24 the second document was signed, 33. I grant you that
09:50:06 25 wasn't your firm, but they were represented by counsel.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:50:08 2 They agreed to that. The Court could not have issued
09:50:11 3 and order unless the parties had agreed to it because
09:50:14 4 it's a stipulated order. So, how were they compelled to
09:50:18 5 produce this information?

09:50:20 6 MR. GREEN: They would be compelled to
09:50:22 7 produce it if we were ordered to provide access again.
09:50:26 8 If we were ordered to provide, we didn't -- there was
09:50:32 9 never any promise in those orders that everything would
09:50:34 10 be produced. And there was a great deal we didn't know
09:50:37 11 at the time. And even those orders and the protective
09:50:41 12 order, this all contemplated privileged information.
09:50:45 13 Being turning over privileged information. And not only
09:50:47 14 that, but also personal private information. So, it's
09:50:51 15 not -- agreeing to that stipulation is not in any sense
09:50:57 16 a waiver of our Fifth Amendment rights. And if we are
09:51:04 17 compelled to waive them by order of the Court, which is
09:51:11 18 what Moog is seeking, that is a different story.

09:51:14 19 And, you know, if I can get back to the, if
09:51:18 20 we want to talk about the act of production and the
09:51:23 21 foregone conclusion doctrine.

09:51:27 22 MAGISTRATE JUDGE MCCARTHY: Yes, let's talk
09:51:28 23 about that.

09:51:30 24 MR. GREEN: And, your Honor, I find it very
09:51:33 25 strange, this argument that there is a foregone

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:51:35 2 conclusion when, first of all, Plaintiff hasn't told us
09:51:41 3 exactly how much of our devices that they ever had
09:51:44 4 access to they've even reviewed. But, they've
09:51:51 5 constantly said that they don't know what is on those
09:51:54 6 devices, that they need to look at them to see what is
09:51:57 7 on those devices in order to tell us what their trade
09:52:03 8 secrets are. I don't believe they actually do need to
09:52:05 9 look at them to tell us what their trade secrets are,
09:52:09 10 even based on their own admissions. But they have said
09:52:13 11 over and over that they don't know what is on those
09:52:17 12 devices.

09:52:18 13 MAGISTRATE JUDGE MCCARTHY: Mr. Green, let
09:52:19 14 me just jump in for a second. Whether or not they know
09:52:22 15 what's on the devices, my understanding, and correct me
09:52:25 16 if I'm wrong, but the foregone -- first of all, I think
09:52:29 17 it's well settled that the contents of the devices
09:52:32 18 themselves are not protected by the Fifth Amendment.
09:52:38 19 What is protected, potentially, by the Fifth Amendment
09:52:41 20 is a testimonial production, which would indicate that
09:52:46 21 your client, that they were your client's devices. But,
09:52:52 22 that's, as far as I can tell, that is a foregone
09:52:56 23 conclusion. Your clients have repeatedly admitted that
09:52:59 24 those were those devices and they turned over their
09:53:03 25 devices to IDS.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:53:05 2 MR. GREEN: No, your Honor.

09:53:06 3 MAGISTRATE JUDGE MCCARTHY: What is
09:53:07 4 privileged about that? It may be that the contents are
09:53:10 5 incriminating, it may be that they are not, I don't
09:53:13 6 know. But if they are, the contents are not protected
09:53:18 7 by the Fifth Amendment.

09:53:19 8 MR. GREEN: No, your Honor, it's the
09:53:27 9 existence of information on those devices that would be
09:53:31 10 testimonial. It's what that -- what that -- the fact
09:53:37 11 that they have those devices, that those devices are
09:53:41 12 theirs, that is not -- I wouldn't say that is relevant.
09:53:46 13 What is relevant is what data is on them. And if they
09:53:51 14 provide access to those devices, your Honor, then that
09:53:56 15 would admit existence of certain data in their
09:54:03 16 possession, custody and control. And we haven't
09:54:07 17 admitted that as to any particular device. So, the Act
09:54:15 18 of Production Doctrine does apply. There is no foregone
09:54:17 19 conclusion of what any of those devices contain. What
09:54:22 20 we were asked to provide to IDS is very broad. It was
09:54:27 21 just any device that we had used while we were -- while
09:54:33 22 our clients were employed by Moog. So, that, in itself,
09:54:42 23 does not tell you this is what's on this device, this is
09:54:46 24 what's on that device, and that is a far different
09:54:51 25 issue. What information exists on those devices. That

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

09:54:56 2 is the testimonial aspect. For instance, say you have a
09:55:01 3 safe, and you -- everyone knows, it's a foregone
09:55:05 4 conclusion that someone has a safe. But it's not a
09:55:09 5 foregone conclusion of what's inside the safe. And if a
09:55:13 6 person provides -- so the Act of Production Doctrine
09:55:17 7 would apply before someone could give you the password
09:55:21 8 to open that safe and see what's inside because that is
09:55:25 9 how you would confirm the existence of --

09:55:30 10 MAGISTRATE JUDGE MCCARTHY: Well, the giving
09:55:31 11 of the password is testimonial because that establishes
09:55:34 12 a tie between you and -- not you -- but a person and
09:55:38 13 what's in the safe. But, and, you know, I'll take
09:55:44 14 another look at it, but my understanding is the contents
09:55:48 15 of the safe themselves are not protected by the Fifth
09:55:52 16 Amendment, even though they may be incriminating. The
09:55:55 17 only thing that is protected is testimonial connection
09:55:59 18 between the potential Defendant and the document or the
09:56:04 19 electronic device or whatever. And in this case, that
09:56:09 20 is really not an issue any longer, as far as I can see.

09:56:18 21 MR. GREEN: But it's not, though. There has
10:17:13 22 not been any admission as to what is on any particular
10:17:17 23 device.

10:17:17 24 MAGISTRATE JUDGE MCCARTHY: That's true, but
10:17:21 25 what has been admitted is that they are their devices.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:17:26 2 MR. GREEN: Yes, that they are their
10:17:32 3 devices. But that does not -- that's not with the Act
10:17:41 4 of Production Doctrine protects. The Act of Production
10:17:51 5 Doctrine protects the actual contents of the device.
10:17:57 6 And to produce the contents of those devices, that would
10:18:02 7 be an -- that could be an incriminating act. So, that
10:18:10 8 act of production, it does apply. I can actually read
10:18:21 9 -- hold on, let me find. Yes, the Act of Production may
10:18:31 10 implicitly communicate statements of fact by compelling
10:18:35 11 the person to admit that the papers existed, were in his
10:19:34 12 possession or control and were authentic, that is *United*
10:19:42 13 *States v Dell*.

10:19:42 14 MAGISTRATE JUDGE MCCARTHY: Exactly. And
10:19:43 15 the Defendants here have admitted, we're talking about
10:19:47 16 23 electronic devices, and the Defendants have admitted
10:19:52 17 that they are theirs. So, regardless what is in those
10:19:55 18 devices, the content of those devices is not what is
10:19:59 19 protected by the Fifth Amendment.

10:20:01 20 MR. GREEN: Your Honor, we're not sued for,
10:20:05 21 for having possession of those devices. Those are our
10:20:08 22 devices. What we're sued for is what might be,
10:20:12 23 according to Plaintiff, on those devices.

10:20:14 24 MAGISTRATE JUDGE MCCARTHY: Right.

10:20:15 25 MR. GREEN: So, the fact that the devices

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:20:17 2 exist and were ours, that's not very relevant to this,
10:20:27 3 to this inquiry. What is relevant to this inquiry is
10:20:31 4 what's inside the devices. Whether -- whether any of
10:20:35 5 Moog's data is inside these devices. And that is what
10:20:43 6 the act of production, how the Act of Production
10:20:50 7 Doctrine applies to them. So, it does apply, there is
10:20:55 8 no foregone conclusion as to what the devices contain.
10:20:59 9 And for us to provide access to them would allow the
10:21:07 10 confirmation of the existence or would communicate
10:21:13 11 information about, you know, certain data's existence,
10:22:24 12 (inaudible) and authenticity. And that is why the Fifth
10:22:28 13 Amendment would apply to our devices.

10:22:31 14 MAGISTRATE JUDGE MCCARTHY: Okay. I'll
10:22:34 15 consider that.

10:22:36 16 Mr. Fluskey, do you agree with Mr. Green's
10:22:39 17 characterization of what the Fifth Amendment protects?

10:22:42 18 MR. FLUSKEY: I do not, your Honor. I would
10:22:44 19 agree with the construct that you summarized, which is
10:22:49 20 that the documents themselves are not subject to Fifth
10:22:53 21 Amendment privilege. And, in fact, the *Burt Hill* case,
10:22:58 22 *Burt Hill v. Hassan* that we cite in our brief addresses
10:23:00 23 this very issue. So the document itself or the data
10:23:09 24 itself is not subject to Fifth Amendment privilege. And
10:23:13 25 the foregone conclusion that the devices are the

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:24:12 2 individual Defendants. It's also a foregone conclusion
10:24:15 3 that they possessed Moog's confidential information
10:24:23 4 because they admitted in RFAs, R-F-A, responses. So, I
10:24:33 5 don't agree with Mr. Green's summary of whether or not
10:24:37 6 the Fifth Amendment would apply in the first instance.

10:24:41 7 And two of their very quick points, your
10:24:44 8 Honor, counsel has indicated that there has been a
10:24:47 9 blanket assertion of the Fifth Amendment privilege. It
10:26:11 10 has not happened. We're dealing with a hypothetical
10:26:47 11 invocation of a privilege. There has been no amendment
10:26:53 12 to discovery responses where the Fifth Amendment was
10:27:00 13 invoked.

10:27:01 14 One final point, you need not even get to
10:27:04 15 waiver, your Honor, to restore access to these devices.
10:27:09 16 Because there is no basis for the claw back. This
10:27:12 17 information was already disclosed, Moog was in the
10:27:18 18 process of reviewing it. And the Act of Production
10:27:32 19 Doctrine does not apply. So you need not reach waiver.
10:27:39 20 Waiver is an independent basis for restoring access, but
10:27:42 21 you need not reach it.

10:27:45 22 MR. GREEN: Your Honor, if I could just add
10:27:47 23 something. What the requests have stated or request for
10:27:53 24 admission, and we did reserve our or preserve our
10:27:59 25 objections to that, but whether there is Moog data on

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:28:05 2 the devices isn't even the question, but whether there
10:28:09 3 are Moog trade secrets on the devices. So, looking at
10:28:16 4 -- and that is the -- that is the important question.
10:28:18 5 Because there could be a whole host of data from Moog
10:28:22 6 that is not a trade secret. But Moog hasn't told us
10:28:25 7 what the trade secrets are. And that is why the Act of
10:28:35 8 Production Doctrine does apply. Whether it would
10:28:40 9 confirm or disconfirm, if that is the word, whether
10:28:49 10 there are trade secrets on those devices, and that is
10:28:55 11 not a foregone conclusion.

10:28:58 12 MAGISTRATE JUDGE MCCARTHY: Okay. Thank you
10:28:59 13 all. I recognize that the Fifth Amendment privilege of
10:29:03 14 all of the privileges that are available to anyone is
10:29:07 15 certainly one of the most important privileges and I
10:29:11 16 treat it as such. I treat my approach to this issue
10:29:16 17 very carefully. Having said that, I don't think there
10:29:21 18 is a privilege. I think I respectfully disagree with
10:29:26 19 Mr. Green that the contents of the devices are what is
10:29:31 20 protected by the Fifth Amendment. I think the case law
10:29:34 21 is clear that that is not what is protected. What is
10:29:37 22 protected is any testimonial connection between the
10:29:42 23 individual and the devices. But, the relationship
10:29:47 24 between Defendants Pilkington and Kim in these 23
10:29:53 25 devices is a foregone conclusion. They've already

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:29:57 2 admitted that they are their devices. Whether there is
10:30:01 3 anything on them that is incriminatory or not, I
10:30:04 4 certainly can't say, I haven't seen them. Moog can't
10:30:07 5 say, they haven't seen them. But, I think there is no
10:30:11 6 privilege to protect.

10:30:16 7 Secondly, if there was a privilege, it was
10:30:20 8 -- the production was not compelled. The production was
10:30:24 9 voluntary under the two stipulations and orders to which
10:30:28 10 the Defendants agreed. The second one, docket No. 33,
10:30:33 11 they agreed after they were represented by counsel, and
10:30:37 12 that document specifically reaffirmed all of the
10:30:40 13 obligations under the initial stipulation and order,
10:30:44 14 docket No. 25.

10:30:48 15 Thirdly, if there was the privilege, I think
10:51:12 16 it has been waived. I think it was or should have been
10:51:17 17 obvious to the Defendants from the outset of this case
10:51:19 18 that there was potential Fifth Amendment ramifications
10:51:22 19 to the production of any evidence. And, perhaps, one
10:51:27 20 striking indication of that fact is that the second
10:51:30 21 Stipulation and Order, docket No. 33, specifically
10:51:36 22 mentions at paragraph 3, the possibility of a Fifth
10:51:41 23 Amendment. And it says, and I quote, "In the event any
10:52:40 24 witness knows prior to their noticed deposition that the
10:52:43 25 witness will invoke the Fifth Amendment," and then says

MOOG, INC. VS. SKYRYSE, INC. ET AL.

what should occur. So, somebody was thinking of Fifth Amendment back at that early date before any production of these devices was made. Now, having said that, and so my conclusion is, and I will or I am writing on this and you'll get that, I think that there is no Fifth Amendment protection with respect to the devices themselves. If there was a Fifth Amendment protection, it has been waived.

However, and this, I guess, segues into the stay motion, which we'll be discussing on a different date, that does not mean that the Defendants have waived any Fifth Amendment right that they would have to refuse to testify in a deposition. And if the case is not stayed, and if they invoke that right, there may be a presumption drawn against them. That is not a question that I need to address today, but I just want to make clear that I am not saying that they have waived any future testimonial Fifth Amendment privilege. They remain free to assert that. Because this is such an important issue, even though my understanding of whether a ruling on a privilege issue is dispositive or non-dispositive, I think the case law is clear that it is non-dispositive, meaning that any decision that I render would be reviewable only if clearly erroneous.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

10:54:25 2 Nonetheless, I will give -- I will, once my written
10:54:29 3 decision is issued, I will give the individual
10:54:33 4 Defendants a brief period of time to obtain a stay, if
10:54:38 5 they can, from Judge Vilardo. But I want to be clear
10:54:42 6 that that doesn't mean that they apply for a stay and
10:54:45 7 the stay is effective. It is effective only if they
10:54:49 8 obtain a stay from him. They may, they may not, I don't
10:54:53 9 know, but I just want that to be clear.

10:54:57 10 And in terms of the timing of my written
10:55:00 11 decision, I've been working on it already. I'm going to
10:55:03 12 be out of the office tomorrow. I plan to get my
10:55:07 13 decision out to the parties early next week, both on the
10:55:15 14 jurisdictional issues with respect to -- or on the
10:55:19 15 proper forum for the preliminary injunction hearing, and
10:55:24 16 on the claw back and access issues. And I will give
10:55:30 17 Pilkington, and, excuse me, and Kim a brief opportunity
10:55:35 18 to obtain a stay from Judge Vilardo if they can.

10:55:39 19 Now --

10:55:44 20 MR. LUMISH: Your Honor, may I add one thing
10:55:46 21 on behalf of Skyryse, and I did not get a chance to
11:09:06 22 speak before you issued your decision.

11:09:13 23 MAGISTRATE JUDGE MCCARTHY: Yes.

11:09:16 24 MR. LUMISH: And I'm not going to try to
11:09:18 25 talk you out of the tentative as much as the timing,

MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:09:27 2 which is the real thing that this argument has
11:09:31 3 illuminated for Skyryse is the really critical need for
11:09:37 4 a stay while these criminal proceedings are going
11:09:40 5 forward. Because what I heard was your Honor's ruling
11:09:44 6 will be that the documents and the devices will be
11:09:47 7 produced, but that the witnesses may still now rely upon
11:09:52 8 the Fifth Amendment when they are deposed about those
11:09:55 9 documents. And that is a catastrophic situation for
11:10:00 10 Skyryse in that our position is that we need the
11:10:04 11 discovery, too, for a full defense and for due process
11:10:07 12 for us. And we also heard Mr. Fluskey talk about, and
11:10:12 13 preview, that he intends to ask for an adverse inference
11:10:16 14 against Skyryse, who has produced everything that it can
11:10:22 15 find in a timely fashion. And so my request to the
11:13:09 16 Court is actually that your Honor hold back in issuing
11:13:13 17 your ruling until you decide the stay question because
11:13:16 18 the need for a stay is, in fact, evidenced by this
11:13:21 19 issue. Part of our argument is that we need either all
11:13:24 20 or nothing in the civil case, and it should be, if we're
11:13:27 21 going to get partial, because the Fifth Amendment
11:13:30 22 invocations on testimony, and then requests for adverse
11:13:34 23 inferences based on those invocations, Skyryse is being
11:13:38 24 extraordinarily prejudiced through no conduct of its
11:13:43 25 own, and so --

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:13:43 2 MS. ANDOH: Your Honor, can I be heard on
11:13:45 3 this?

11:13:45 4 MAGISTRATE JUDGE MCCARTHY: Just a minute.
11:13:46 5 Just a minute. Mr. Lumish, just to give you a bit of
11:13:51 6 comfort, you know, I want to be clear. I am not ruling
11:13:54 7 that there is an adverse inference to be drawn against
11:13:58 8 anybody, and, in particular, an adverse inference to be
11:14:03 9 drawn against Skyryse, which, unless I'm surprised,
11:14:09 10 Skyryse's witnesses will not be invoking Fifth Amendment
11:14:15 11 grounds for refusing to testify at a deposition. Maybe
11:14:19 12 they will, in which case that may become an issue.
11:14:22 13 But, you know, I know there is a lot of considerations
11:14:26 14 to be drawn as to whether a stay should be granted, and,
11:14:31 15 if not, whether an adverse inference can be drawn
11:14:35 16 against anyone. So, I'm not -- I'm certainly not
11:14:37 17 deciding those today.

11:14:39 18 MR. LUMISH: I appreciate that very much,
11:14:41 19 your Honor.

11:14:41 20 MS. ANDOH: Your Honor, if I may because
11:14:43 21 there is a related --

11:14:44 22 MAGISTRATE JUDGE MCCARTHY: One at a time,
11:14:45 23 please, okay?

11:14:46 24 Ms. Andoh, you go now.

11:14:49 25 MS. ANDOH: Thank you, your Honor. So, what

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:14:51 2 Mr. Lumish just stated on the record here raises another
11:14:55 3 concern that Moog has and wanted to raise this before
11:14:58 4 your Honor today just to figure out procedurally what
11:15:01 5 the best option would be here. So, a week ago, when we
11:15:05 6 were responding to the individual Defendant's motion to
11:15:09 7 stay, vis-a-vis the, individual Defendants only, meaning
11:15:17 8 the individual Defendants moved for a stay only with
11:15:20 9 respect to the two of them, after we had already filed
11:15:26 10 our opposition to that motion to stay, Skyryse filed a
11:15:30 11 brief that, in which they sought, even though they were
11:15:34 12 not a movant, a stay of the entire action. And our view
11:15:38 13 of that is both that it is improper because it was not
11:16:40 14 actually a motion, it was also not styled as a cross
11:16:44 15 motion, it was styled as sort of a "me too" brief,
11:16:47 16 except they were now arguing for a stay of the complete
11:16:53 17 case instead of a vis-a-vis the individual Defendants
11:17:03 18 and also because of the structure of the briefing, in
11:17:10 19 other words, the individual Defendants filed the initial
11:17:12 20 motion, we were intending to oppose it and the
11:17:15 21 individual Defendants were then going to file a reply,
11:17:17 22 which we've now done. We were given no opportunity
11:17:21 23 whatsoever to respond to Skyryse's request for relief,
11:17:26 24 which is not only improper, but also different in scope
11:17:31 25 than the relief that individual Defendants were

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:17:35 2 receiving. We were going to file a motion for leave
11:17:39 3 with a supplemental brief, but, frankly, your Honor,
11:17:42 4 given how cluttered the docket has been over the last
11:17:48 5 few weeks, we actually thought it would be better to
11:17:51 6 actually come to your Honor and try and find out what
11:17:56 7 your Honor would prefer as a mechanism you prefer to
11:18:04 8 address these arguments prior to the argument on
11:18:09 9 September 12th. But Moog absolutely needs the
11:18:16 10 opportunity to respond to this because the relief that
11:18:21 11 is being sought, to the extent that it's even being
11:18:24 12 sought, because it's not in the context of it, actually,
11:18:30 13 as an affirmative motion, is substantially broader and
11:18:36 14 the arguments that are being made are substantially
11:18:39 15 different than the arguments that Moog responded to in
11:18:41 16 its opposition brief.

11:18:42 17 MAGISTRATE JUDGE MCCARTHY: Okay. Ms.
11:18:44 18 Andoh, I will confess that, you know, I've had a fairly
11:18:48 19 full plate just getting ready for today, so other
11:18:52 20 motions that have been filed, I have not paid close
11:18:56 21 attention to. Tell me the docket number, if you can, of
11:19:01 22 the --

11:19:01 23 MS. ANDOH: Geez, your Honor.

11:19:03 24 MAGISTRATE JUDGE MCCARTHY: Maybe Mr. Lumish
11:19:06 25 or when was it filed?

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:19:07 2 MS. ANDOH: It was filed a week ago
11:19:09 3 yesterday. So, basically what happened, your Honor, is
11:19:11 4 when your Honor gave the briefing schedule for the
11:19:14 5 motion to stay, the original brief in the motion to stay
11:19:17 6 was filed by the individual Defendants, and it was filed
11:19:19 7 at the, I believe, it was the end of July and then --

11:19:24 8 MAGISTRATE JUDGE MCCARTHY: I only thought
11:19:26 9 at the time that the individual Defendants were the only
11:19:30 10 ones seeking a stay.

11:19:32 11 MS. ANDOH: That is true.

11:19:33 12 MAGISTRATE JUDGE MCCARTHY: So this is news
11:19:35 13 to me.

11:19:35 14 MS. ANDOH: And so then, and so they did,
11:19:37 15 they filed their brief. And we then, two weeks later,
11:19:40 16 so August 3rd was the date of the original filing by the
11:19:43 17 individual Defendants for a stay, vis-a-vis, them. We
11:19:47 18 then responded on, with our opposition brief, on the
11:19:52 19 17th of August. And we responded to the individual
11:19:54 20 Defendant's motion. Skyryse then filed, after we had
11:19:59 21 already filed our opposition brief, filed a brief that
11:20:03 22 was a responsive brief.

11:20:07 23 MAGISTRATE JUDGE MCCARTHY: I see it now.

11:20:08 24 MS. ANDOH: Yeah, to the individual
11:20:11 25 Defendants, but it's seeking a stay of the entire

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:20:13 2 action. So, it's operationally a completely different
11:20:17 3 motion for stay than the individual Defendants, and Moog
11:20:19 4 has had no opportunity to respond to it.

11:20:21 5 MAGISTRATE JUDGE MCCARTHY: Okay. I think
11:20:22 6 I'm looking at it now. It's docket No. 241.

11:20:28 7 MR. LUMISH: Correct, your Honor.

11:21:45 8 MR. GREEN: Your Honor, can we be heard on
11:21:47 9 this briefly to clarify something?

11:21:50 10 MAGISTRATE JUDGE MCCARTHY: Can you please
11:21:51 11 just let me look at the document first? And then I'll
11:21:53 12 get -- we got plenty of time. I've cleared my
11:21:57 13 afternoon.

11:21:57 14 MR. GREEN: Thank you, your Honor.

11:21:58 15 MAGISTRATE JUDGE MCCARTHY: Everyone will
11:21:59 16 get a chance to speak, but I'm trying to go through one
11:22:02 17 thing at a time.

11:22:03 18 I'm looking at docket No. 241, entitled
11:22:07 19 "Skyryse's Supplemental Brief in Support of Individual
11:22:10 20 Defendant's Motion to Stay the Action." Is that what
11:24:10 21 we're talking about?

11:24:11 22 MS. ANDOH: That is it, your Honor. And
11:24:13 23 that, and that is what we've not responded to.

11:24:17 24 MAGISTRATE JUDGE MCCARTHY: Understandably.
11:24:19 25 Mr. Lumish or Mr. Gross, I mean, you didn't make your

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:24:24 2 own motion. What's going on?

11:24:28 3 MR. GREEN: Your Honor may I.

11:24:32 4 MAGISTRATE JUDGE MCCARTHY: Mr. Green, just
11:24:33 5 a second, I asked Mr. Gross and Mr. Lumish a question,
11:24:36 6 you'll have your opportunity in a moment.

11:24:39 7 MR. GREEN: Thank you, but Ms. Andoh's, our
11:24:41 8 request for a stay was of this action, not just against
11:24:47 9 us.

11:24:48 10 MAGISTRATE JUDGE MCCARTHY: I'm not talking
11:24:49 11 about your motion. I'm talking about Skyryse's
11:24:52 12 supplemental brief. Okay?

11:24:54 13 MR. LUMISH: Yes, your Honor. This is Doug
11:24:55 14 Lumish for Skyryse. We understood the individual
11:24:58 15 Defendant's motion to request a stay of the entire
11:25:00 16 action, and, in the alternative, a stay for them. And
11:25:05 17 so what we filed was a motion or a brief, I should say,
11:25:09 18 excuse me, in support of that relief. We think a stay
11:25:12 19 of the entire action is critical, and we think it would
11:25:15 20 be prejudicial to Skyryse to stay only the individual
11:25:18 21 Defendants for the reasons that I previewed, but have
11:25:21 22 not fully argued to your Honor. If we should have filed
11:25:24 23 that as a separate motion, we're happy to do that. We
11:25:27 24 can do that right away. And we have no objection to
11:25:29 25 Moog's responding to it.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:25:31 2 MAGISTRATE JUDGE MCCARTHY: Okay. Well, I
11:25:33 3 mean, again, folks, I have not drilled down on any of
11:25:37 4 the stay motions right now because I've had enough to do
11:25:40 5 to get ready for today. But, whether -- the issue is
11:25:45 6 out there now on behalf of the individual Defendants as
11:25:48 7 well as on behalf of Skyryse. I won't make Skyryse go
11:25:53 8 through the needless formality of deeming it a "me too"
11:25:58 9 motion, but I'll deem it a "me too" motion and I'll
11:26:02 10 issue a text order to that effect, but I will give Moog
11:26:06 11 an opportunity to respond to it because they are
11:26:08 12 certainly entitled to that.

11:26:11 13 So, Ms. Andoh, you know, I would like to try
11:26:14 14 and keep things on with respect to the stay motion for
11:26:17 15 -- what are we on for, the 12th?

11:26:19 16 MS. ANDOH: We are, your Honor. I think we
11:26:21 17 should be able to respond within, how about a week from
11:26:26 18 today, so you have enough time to review it before the
11:26:29 19 hearing? Does that work?

11:26:34 20 MAGISTRATE JUDGE MCCARTHY: Today is?

11:26:35 21 MS. ANDOH: The 25th, so September 1st.

11:26:37 22 MAGISTRATE JUDGE MCCARTHY: Yes, certainly.
11:26:39 23 Yes, absolutely. Even if you need a little more time
11:26:42 24 than that. I want to remind people, I think I mentioned
11:26:45 25 that at one of our more recent conferences, but as of

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:26:51 2 September 15th, I will be out of the country, returning,
11:26:56 3 depending on flight arrangements, either on the 26th or
11:27:00 4 27th. So I will definitely be back in on the 28th.
11:27:05 5 But, yes, I will be available, and I can conduct the
11:27:08 6 argument on the stay motions. We'll call them motions
11:27:13 7 now. I'll consider it an additional motion by Skyryse.
11:27:19 8 So, I will be prepared for the argument on the 12th. If
11:27:24 9 you get it in by -- why don't, you said the 1st? Why
11:27:32 10 don't -- I'll give you well the 5th is Labor Day, so
11:27:36 11 even if you want to get -- if you can get it in by --
11:27:40 12 get it in by the 2nd, can you do that?

11:27:43 13 MS. ANDOH: I can, your Honor, that is fine.
11:27:45 14 I, frankly, and I don't want to jinks anybody from, my
11:27:50 15 view, my hope is to give the team the Labor Day off so
11:27:57 16 I'll submit by then.

11:27:59 17 MAGISTRATE JUDGE MCCARTHY: You're getting
11:28:00 18 soft. You're getting soft.

11:28:01 19 MS. ANDOH: I feel I'm jinxing it by saying
11:28:04 20 it out loud.

11:28:05 21 MR. LUMISH: Your Honor.

11:28:06 22 MAGISTRATE JUDGE MCCARTHY: Yes, who spoke?

11:28:08 23 MR. LUMISH: First, an apology, and then a
11:28:11 24 request. To the extent we misunderstood your Honor's
11:28:14 25 text order, which instructed the individual Defendants

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:28:16 2 to file their motion and for responses to come in from
11:28:19 3 the other parties, that is on me, and I apologize for
11:28:22 4 that. I didn't appreciate that would have contemplated
11:28:26 5 it as a separate motion. Since we're now deeming it as
11:28:29 6 a separate motion, we would then ask for a reply brief
11:28:33 7 in the normal course.

11:28:34 8 MAGISTRATE JUDGE MCCARTHY: So, if Moog
11:28:35 9 gets, Rena, what did I say, next Friday? I mean, if you
11:28:40 10 folks want to have the weekend off, we can make it
11:28:44 11 Thursday.

11:28:45 12 MS. ANDOH: Friday, September 2nd is fine
11:28:47 13 with us.

11:28:48 14 MAGISTRATE JUDGE MCCARTHY: So, then I will
11:28:49 15 allow replies by, how about by close of business? Can
11:28:57 16 we say close of business on September 7th, or I won't
11:29:04 17 even say close of business, I'll say September 7th,
11:29:08 18 because I know for you folks means 11:59 p.m., I've seen
11:29:13 19 that.

11:29:13 20 MR. LUMISH: 11:59:59, your Honor.

11:29:16 21 MAGISTRATE JUDGE MCCARTHY: And plus you get
11:29:19 22 West Coast, so you can bump it out three hours further.
11:29:21 23 But does that work for everybody?

11:29:23 24 MR. LUMISH: We much appreciate it, your
11:29:26 25 Honor. Thank you.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:29:26 2 MAGISTRATE JUDGE MCCARTHY: Let me just say,
11:29:28 3 I am going to get a written decision out on what we've
11:29:31 4 discussed today, because I think everybody needs to
11:29:37 5 cogitate on it. But, again, with respect to the proper
11:29:44 6 forum for the preliminary injunction motion, I will not
11:29:47 7 be changing my mind regardless, maybe Judge Vilardo will
11:29:51 8 take a different view, but I think the parties have
11:29:55 9 contractually consented to the preliminary injunction
11:30:02 10 motion being held in this court regardless of what they
11:30:06 11 thought they were doing or what they intended to do, I
11:30:09 12 think the language of the two, of 25 and 33, read in
11:30:12 13 conjunction with each other, can only mean that the
11:30:17 14 preliminary injunction would take place here. But,
11:30:22 15 having said that, I just want to repeat just for
11:30:26 16 people's benefit, I have not decided down the road
11:30:31 17 whether the remainder of this case would go to
11:30:34 18 California. If Judge Vilardo doesn't fire me in the
11:30:41 19 interim, I think a transfer motion would be
11:30:46 20 non-dispositive, again, subject to review only for being
11:30:52 21 clearly erroneous. And, obviously, there are a number
11:30:56 22 of factors to be considered between now and when that
11:30:59 23 issue would be decided. But I'll just say for the
11:31:02 24 parties' benefit, as I sit here right now, I think there
11:31:06 25 is a pretty strong argument that once the preliminary

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:31:11 2 injunction motion is decided in this court, the balance
11:31:14 3 of the case should go out there. And then you're faced
11:31:18 4 with a decision, okay, now you've got an, or, you either
11:31:21 5 do or do not have a preliminary injunction order from
11:31:24 6 Judge Vilardo, now you have a different judge
11:31:28 7 potentially, at least, looking at it and deciding
11:31:31 8 whether he or she agrees with it and where the rest of
11:31:36 9 the case goes. So, those are just things that I would
11:31:39 10 hope you're all thinking about. And I don't say that
11:31:42 11 because I want to get out of any, you know, work.
11:31:49 12 Obviously this case is pretty fascinating right now.
11:31:51 13 And if I don't do this case, I have other cases to work
11:31:55 14 on. I know that may surprise some of you. I think
11:31:58 15 these are factors that you all ought to be considering,
11:32:02 16 I'm sure you have. I don't mean to suggest you haven't.

11:32:06 17 MR. GREEN: Your Honor --

11:32:07 18 MAGISTRATE JUDGE MCCARTHY: No. Mr. Green,
11:32:08 19 you wanted to say something?

11:32:09 20 MR. GREEN: I didn't mean to interrupt.
11:32:12 21 Just with the timing of the order, I have vacation
11:32:16 22 scheduled for next week, and I'd just like to give
11:32:20 23 myself enough time to respond to the order, especially,
11:32:26 24 you know, on the Act of Production issues.

11:32:31 25 MAGISTRATE JUDGE MCCARTHY: Okay. You know,

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:32:32 2 I understand people need to have some R and R time and
11:32:40 3 we all want to move the case along, but I think in the
11:32:44 4 grand scheme of things, particularly given the time of
11:32:47 5 year, that what we're still going to be arguing a stay
11:32:51 6 motion on September 12th, so, I will give you some time,
11:32:55 7 too. Are you out all of next week?

11:32:59 8 MR. GREEN: Yes, I am, your Honor.

11:33:01 9 MAGISTRATE JUDGE MCCARTHY: Okay. So I'll
11:33:03 10 factor that into how long we -- and, you know, I may
11:33:09 11 roll the whole thing over into the stay motion, but one
11:33:13 12 way or the other, my view is that you're going to have
11:33:16 13 to allow the access sooner or later, you can see if you
11:33:21 14 can convince Judge Vilardo otherwise.

11:33:25 15 One other thing, and Moog made a point of
11:33:27 16 this in one of their recent submissions, but I would
11:33:31 17 just like to reiterate because I have seen, and I forget
11:33:34 18 who, but somebody on the defense side saying more than
11:33:38 19 once that I have ordered Moog to disclose their trade
11:33:45 20 secrets now. And if you look back at my July, I think,
11:33:49 21 27th or whatever order, docket No. 205, that is not what
11:33:56 22 I did. What I said is, we're going to proceed in an
11:34:00 23 orderly fashion. I recognize the arguments on both
11:34:02 24 sides. But, on balance, Moog is going to have to make
11:34:06 25 that disclosure, but after they've had a sufficient

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:34:10 2 opportunity to figure out, not what their trade secrets
11:34:16 3 are, because, frankly, in the abstract, I don't care
11:34:21 4 what their trade secrets are, what I care about are
11:34:24 5 trade secrets that they claim in this case for purposes
11:34:27 6 of this preliminary injunction motion, to have been
11:34:32 7 misappropriated. So, that is why they need access to
11:34:36 8 the Defendants' information. Once that occurs, then
11:34:39 9 they will be required to make that disclosure. So, and
11:34:42 10 I don't want there to be any confusion about whether or
11:34:46 11 not I have already ordered Moog to do this, because I
11:34:49 12 have not. Okay.

11:34:52 13 Is there anything else that anybody wants to
11:34:56 14 bring to my attention today?

11:34:59 15 MS. YIP: Yes, your Honor. This is Lai Yip
11:35:01 16 on behalf of Moog. I think at the beginning of the
11:35:03 17 hearing you had said that the motion for clarification
11:35:07 18 brought by Moog would be heard today. I just wanted to
11:35:10 19 confirm that that still will be heard.

11:35:15 20 MAGISTRATE JUDGE MCCARTHY: Yes. Although,
11:35:17 21 as I see it, it kind of dovetails in with the stay
11:35:21 22 motion. Yes, I will hear from you on that and then I'll
11:35:24 23 hear from Defendants.

11:35:26 24 MS. YIP: Okay. Well, thank you, your
11:35:28 25 Honor.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:35:29 2 So, the Court issued an order directing that
11:35:32 3 pending discovery deadlines our temporarily stayed. The
11:35:37 4 issue here, and the subject of our motion, which is
11:35:40 5 Skyryse's refusal to print documents from the inspection
11:35:44 6 environment is not a discovery deadline issue. It's not
11:35:47 7 even fundamentally about discovery. We've already
11:35:51 8 discovered the information in the IDS inspection
11:35:54 9 environment, that is undisputed. We've already seen it
11:35:56 10 and we're seeing it every day. The issue is one of
11:36:00 11 form. The problem is, that Skyryse is refusing to print
11:36:04 12 the documents that we have already discovered so that we
11:36:08 13 can actually use it in this case. And when I say
11:36:11 14 "print," I'm using that as a shorthand to refer to
11:36:14 15 Skyryse providing us the document outside of the IDS
11:36:18 16 inspection environment. So, for example, we've already
11:36:20 17 discovered during the inspection the chat messages on
11:36:24 18 the Skyryse device where Skyryse employees discussed
11:36:28 19 what Moog data can be "pilfered." But Skyryse is
11:36:39 20 refusing to print that document in this case so that we
11:36:46 21 can use it in this case. We also need the documents
11:37:46 22 printed so that it receives the proper confidentiality
11:37:51 23 designation. Everything available for inspection at IDS
11:37:54 24 is, by default, designated "outside counsel" and "expert
11:37:59 25 eye's only." Documents get properly and accurately

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:38:02 2 designated when they are printed. For example, going
11:38:05 3 back to the chat messages where Skyryse personnel are
11:38:11 4 discussing pilfering Moog data, that is by default
11:38:21 5 designated "outside counsel" and "expert's eyes only."
11:38:24 6 But these messages definitely do not merit this
11:38:57 7 designation, and certainly it makes sense that we cannot
11:39:04 8 discuss the messages specific content with our clients.
11:39:08 9 But that is exactly what's happening right now. And the
11:39:11 10 ability to discuss those contents and those documents
11:39:14 11 with our clients is important for our trade secret
11:39:16 12 identification process, going back to your comments
11:39:18 13 earlier about that. When these Skyryse personnel, who
11:39:22 14 are former Moog employees, are discussing what you
11:39:26 15 pilfer, they are using terms of art, technical terms,
11:39:28 16 that are specific to Moog. And we need Moog employees
11:39:31 17 to explain to us what those Moog terms mean. But right
11:39:35 18 now we're unable to do that because Skyryse refuses to
11:39:39 19 print the documents and designate them appropriately.
11:39:42 20 And it's impeding our ability to identify the trade
11:39:45 21 secrets that have been used by Skyryse. Again, going
11:39:48 22 back to your Honor's comments that you're not interested
11:39:51 23 in seeing all of our trade secrets, but what has been
11:39:54 24 used in this case, what has been misappropriated. Using
11:39:57 25 an analogy here, it's like us going into a physical

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:40:02 2 inspection to inspect source code where we find and
11:40:08 3 thoroughly analyze a document that clearly shows Skyryse
11:40:12 4 use of our trade secrets. And we ask Skyryse, can we
11:40:18 5 have a printed copy of this document pursuant to the
11:40:20 6 protocol, and they say "no." "You can look at the
11:40:24 7 document, you can analyze it all you want, but we won't
11:40:27 8 give you a copy of it so you can actually use it in this
11:40:31 9 case or show it to the Court." And that makes no sense.

11:40:34 10 One final thing, I do want to point out a
11:40:38 11 very important misrepresentation in Skyryse's response
11:40:43 12 brief at page 3.

11:40:45 13 MAGISTRATE JUDGE MCCARTHY: Which response
11:40:47 14 brief? To the clarification?

11:40:51 15 MS. YIP: Yes, and this would be docket 246,
11:40:56 16 this is Skyryse's response to our motion for
11:40:59 17 clarification.

11:41:00 18 MAGISTRATE JUDGE MCCARTHY: Okay. Let me
11:41:01 19 get that up. And you say page 3?

11:41:04 20 MS. YIP: Yes.

11:41:05 21 MAGISTRATE JUDGE MCCARTHY: Just a minute.
11:41:22 22 Okay. Okay.

11:41:28 23 Where are we here?

11:41:30 24 MS. YIP: In the second full paragraph, the
11:41:32 25 sentence starts with "there is no question," and I'll

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:41:35 2 read.

11:41:36 3 MAGISTRATE JUDGE MCCARTHY: I have it.

11:41:37 4 MS. YIP: Okay. And they say "There is no
11:41:39 5 question that Moog already has access to relevant
11:41:43 6 Skyryse documents on the IDS review computers, and that
11:41:47 7 it can access, review, refer to, and describe them
11:41:50 8 without restriction." That is not true. We can not,
11:41:56 9 for example, this notion that we can describe the
11:42:00 10 documents without restriction is not true. We can not,
11:42:05 11 for example, quote chunks of text in the documents in
11:42:09 12 our submission to the Court because that would be
11:42:11 13 copying of that text and copying of material from the
11:42:14 14 inspection environment is prohibited under the protocol
11:42:17 15 at section (3)(h)(1). We can only quote chunks of texts
11:42:22 16 from the documents if Skyryse provides us with a
11:42:25 17 properly designated copy first. And they have not done
11:42:28 18 so. So, going back to the example of the chat messages
11:42:32 19 discussing pilfering of Moog data, we cannot quote the
11:42:36 20 specific chunks of text that discuss pilfering Moog
11:42:40 21 data, or even the precise Moog data that Skyryse is
11:42:48 22 pilfering. And that is why as you can see that is a
11:42:52 23 consequence in one of our submissions to the Court at
11:42:58 24 docket 210-2, this is the declaration of Kevin Krozner,
11:43:05 25 which is one of the technical experts, that we are

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:43:11 2 forced to discuss the pilfering in pretty vague terms.

11:43:18 3 MAGISTRATE JUDGE MCCARTHY: Let me just pull
11:43:19 4 that up for a minute. 210-2?

11:43:27 5 MS. YIP: Yes. That is Bruce --

11:43:41 6 It's Bruce Pixley's declaration, not Kevin
11:43:47 7 Krozner. Bruce Pixley is also our technical expert.

11:43:52 8 MAGISTRATE JUDGE MCCARTHY: Okay. And,
11:43:54 9 okay.

11:43:55 10 MS. YIP: And you'll see that in the last
11:43:57 11 paragraph of his declaration, he is talking about this
11:44:00 12 pilfering that is occurring. And you'll see he talks
11:44:03 13 about the fact that there are these chat messages, but
11:44:07 14 there is no real detail in there about exactly what Moog
11:44:11 15 data is being referred to. And, again, that is because
11:44:14 16 of this restriction against copying of material, which
11:44:20 17 would include copying whole chunks of text or being able
11:44:26 18 to include all of the chats that are going back and
11:44:28 19 forth between these two Skyryse employees. So, when
11:44:32 20 Skyryse says --

11:44:34 21 MAGISTRATE JUDGE MCCARTHY: Ms. Yip, as I'm
11:44:35 22 at 210-2 of the last paragraph is redacted so presumably
11:44:40 23 because, so, is there an unredacted version of that
11:44:44 24 filed somewhere?

11:44:45 25 MS. YIP: It should be.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:44:47 2 MAGISTRATE JUDGE MCCARTHY: Paragraph 23 is,
11:44:49 3 it looks like the Mar-A-Lago search warrant application,
11:44:53 4 so I can't really see anything.

11:44:55 5 MS. YIP: Yes. It was e-mailed to your
11:44:58 6 Honor, the sealed version was e-mailed to your Honor.

11:45:01 7 MAGISTRATE JUDGE MCCARTHY: Yeah, I'll find
11:45:02 8 it. I'll find it.

11:45:04 9 MS. YIP: But you'll see, when you look at
11:45:06 10 it, we have to describe it pretty generally. And out of
11:45:09 11 an abundance of caution, even though it was described
11:45:16 12 pretty generally, we still sealed it.

11:45:18 13 MAGISTRATE JUDGE MCCARTHY: Okay.

11:45:19 14 MS. YIP: So when Skyryse says we can
11:45:24 15 describe what we are seeing "without restriction," is
11:45:28 16 just false. To be clear, these provisions of the
11:45:31 17 protocol that prohibit copying materials from the
11:45:34 18 inspection environment, they are sensible measures to
11:45:38 19 insure security, but they only work if certain other
11:45:42 20 provisions of the protocol are honored. Skyryse should
11:45:51 21 provide copies of documents when requested pursuant to
11:45:58 22 the protocol, because we are prohibited from copying
11:46:01 23 material or the material ourselves. We believe that
11:46:05 24 Skyryse is well aware that without printouts of the
11:46:08 25 documents, we cannot describe the misappropriation that

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:46:11 2 we're seeing with the kind of particularity and
11:46:14 3 specificity that would be effective. So Skyryse's
11:46:17 4 position is, in effect, a mechanism for obscuring
11:46:21 5 details of the misappropriation from the Court and from
11:46:24 6 our client.

11:46:25 7 MAGISTRATE JUDGE MCCARTHY: Okay. Thank
11:46:26 8 you. Mr. Lumish or Mr. Gross, you want to respond to
11:46:32 9 that?

11:46:32 10 MR. LUMISH: Yes. Thank you, your Honor. I
11:46:33 11 start where you did. Our general view is this is part
11:46:36 12 and parcel with the issues in the stay motion. What
11:46:39 13 they are asking for is production of documents, which is
11:46:43 14 discovery, which, you know, either you're going to tell
11:46:46 15 us.

11:46:47 16 MAGISTRATE JUDGE MCCARTHY: Well, they say
11:46:48 17 it's production of documents that they've already seen.

11:46:50 18 MR. LUMISH: Right. That makes it even
11:46:52 19 worse for them, because they have the documents
11:46:54 20 available to them at IDS, they can review and access
11:46:58 21 them. They are not circumscribed in their ability to do
11:47:02 22 any of the work that they need to do to identify their
11:47:05 23 trade secrets in this case. What Ms. Yip just said,
11:47:08 24 we're trying to hold back from you evidence of
11:47:11 25 "misappropriation." That is discovery for the case that

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:47:15 2 is going to go forward, if your Honor denies the stay
11:47:19 3 motion, which, at which point, we'll be happy to comply
11:47:23 4 with all of our discovery obligations and provide
11:47:53 5 non-privileged materials as required. What you're being
11:48:00 6 asked to do is force a production of documents while you
11:48:04 7 haven't yet addressed the stay, despite the notion that
11:48:07 8 we're holding these things in abeyance, when they have
11:48:10 9 full unfettered access to those documents. And, you
11:48:13 10 know, Ms. Yip, her argument was, well, it's all
11:48:16 11 confidential and we can't say things, I think she said
11:48:20 12 the word "pilfer" six times, whether that is for your
11:48:24 13 Honor's benefit or the press', I don't know, but that is
11:48:27 14 a quote from a document she is telling you she can't
11:50:16 15 quote from. At the end of the day, if she needs to
11:50:47 16 characterize something about misappropriation, that
11:50:49 17 there is no need for that now while we're waiting for a
11:50:52 18 stay to be decided. There is no need for that while
11:50:55 19 they haven't yet identified their trade secrets per your
11:50:58 20 Honor's orders. They are supposed to tell us what trade
11:51:02 21 secrets are at issue, not all of their evidence for
11:51:04 22 misappropriation. Your Honor may deny the stay motion,
11:51:07 23 at which point all bets are off and discovery will
11:51:10 24 proceed. But, if you grant it, this is just an end
11:51:13 25 around on that specific stay. So, that is where I come

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:51:17 2 down, your Honor, we're happy to comply with our
11:51:20 3 obligations. We just think it should be mutual. If
11:51:23 4 there is a stay of discovery, we think it should apply
11:51:27 5 to discovery, generally, other than the things they need
11:52:07 6 to identify trade secrets. And quoting to your Honor
11:52:10 7 the specifics of some text message does not help them
11:52:13 8 identify their trade secrets and it's not required for
11:52:16 9 that.

11:53:10 10 MS. YIP: May I respond to that?

11:53:12 11 MAGISTRATE JUDGE MCCARTHY: Yes, you may.

11:53:32 12 MS. YIP: So, as I mentioned earlier, this
11:53:34 13 is not just about quoting, being able to show your Honor
11:53:36 14 what exactly has been going on, which we've been
11:53:41 15 hamstrung from being able to do, as I mentioned earlier.
11:53:45 16 It is about being able to discuss with our client
11:53:49 17 specific Moog terms, data, references to Moog materials
11:53:56 18 that we need the client's assistance to understand.
11:54:00 19 Again, going back to the chat messages, there is very
11:54:03 20 specific Moog terms of art that are discussed in those
11:54:07 21 chat messages that Moog employees and engineers will
11:54:10 22 know what they are talking about and we need that
11:54:13 23 assistance. The Court has stated that, in our trade
11:54:16 24 secret identification, we should identify the trade
11:54:19 25 secrets that are most at issue, that is what has been

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:54:22 2 used, copied, incorporated, et cetera, by the Defendants
11:54:25 3 and not all 1.4 million files that have been
11:54:28 4 indisputably stolen. The Court has also decided that
11:55:35 5 the ability to inspect the devices at IDS is
11:55:39 6 foundational to be able to identify the trade secrets
11:55:41 7 better at issue. Skyryse's position would, in effect,
11:55:45 8 circumvent the Court's ruling by basically nullifying a
11:55:49 9 key provision in the protocol that would enable us to
11:55:52 10 fully identify the trade secrets at issue by preventing
11:55:55 11 us from obtaining copies of the documents showing the
11:55:58 12 misappropriation so that we can analyze them fully.
11:56:01 13 These documents are of limited use to us if they are
11:56:04 14 stuck on IDS's machines in Washington D.C. As we noted,
11:56:10 15 we are in a position where we cannot show the documents
11:56:13 16 to your Honor. We can not quote chunks of text to them
11:56:16 17 to describe with particularity to your Honor what has
11:57:09 18 been misappropriated that we are finding on the IDS
11:57:13 19 virtual machines and we're in this lopsided situation
11:57:17 20 where, for the very same document, we cannot quote or
11:57:20 21 describe the document with particularity, but Skyryse
11:57:25 22 can because it's from their own device. And, of course,
11:58:39 23 for these types of documents, like the ones talking
11:58:41 24 about pilfering, we don't believe that Skyryse is
11:58:45 25 particularly incentivized to describe them to your Honor

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

11:58:49 2 with particularity.

11:58:49 3 MAGISTRATE JUDGE MCCARTHY: Okay. Ms. Yip,
11:58:51 4 let me ask you this, and without in any way diminishing
11:58:56 5 the importance of these issues because they are
11:58:58 6 important, I grant you that. But we are scheduled for
11:59:03 7 an oral argument on the stay motion in just a little
11:59:07 8 over two weeks on September 12th. Ms. Andoh has said
11:59:14 9 that she is just in a lazy mood, I guess, so she is
11:59:20 10 going to try to give you people the Labor Day weekend
11:59:24 11 off. But I guess is it, is there a compelling reason
11:59:29 12 why this cannot, and I'm going to look at it again and
11:59:33 13 focus on it, but is there a compelling reason why this
11:59:37 14 has to be decided between now and September 12th?

11:59:41 15 MS. YIP: Well, certainly being able to --
11:59:48 16 being able to discuss and analyze the documents with our
11:59:51 17 client would be very helpful, but we also understand
11:59:55 18 some of the scheduling issues that has been discussed.
11:59:57 19 And, so, if this is something that your Honor feels
12:00:00 20 would be better addressed in conjunction with some of
12:00:03 21 the other pending issues, it would be fine with us. We
12:00:08 22 do believe that it will slow down our analysis, as I've
12:00:11 23 mentioned, and I think we all recognize that there is
12:00:14 24 some urgency to that. But, we also understand some of
12:00:17 25 the other counterveiling concerns.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

12:00:20 2 MAGISTRATE JUDGE MCCARTHY: Thank you. I'm
12:00:20 3 not saying I will or will not defer it, but where did
12:00:25 4 Rena Andoh go? There she is. Rena, make sure Lai Yip
12:00:30 5 gets that weekend off.

12:00:32 6 MS. ANDOH: Understood, your Honor.

12:00:33 7 MAGISTRATE JUDGE MCCARTHY: But let me just,
12:00:36 8 and we're not going to discuss the stay motions in any
12:00:39 9 great detail right now, because, frankly, I have not
12:00:42 10 studied those submissions in any great detail, but let
12:00:49 11 me just ask defense counsel in general, I mean to stay
12:00:54 12 the entire case pending -- which I think is what you
12:00:57 13 want -- pending the conclusion of a criminal
12:01:02 14 investigation and/or proceeding that nobody knows if or
12:01:08 15 when there will be charges or if so, how long it will
12:01:13 16 take to resolve those charges, we could be talking
12:01:16 17 years, right?

12:01:20 18 MR. TRUITT: It's certainly possible, your
12:01:23 19 Honor. I think it's important to note that it looks
12:01:26 20 like a criminal indictment is coming down. They are the
12:01:33 21 subjects, not just witnesses of an investigation. And I
12:01:54 22 think, you know, once you get back to look at the
12:01:57 23 motions to stay, you're going to see that the
12:02:00 24 identification of these trade secrets is a pivotal
12:02:06 25 point, which is sort of getting in the way of everything

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

12:02:08 2 proceeding in a timely manner, at least from the
12:02:11 3 Defendants' perspective.

12:02:14 4 MAGISTRATE JUDGE MCCARTHY: Okay. Well,
12:02:16 5 yeah, I mean, I got a lot of thinking to do between now
12:02:19 6 and then. But, I mean, and I've said this before, but
12:02:23 7 we're kind of in a chicken and egg situation. Because,
12:02:27 8 I mean, I've ruled what I've ruled in terms of who has
12:02:32 9 got to disclose what when. And nobody has objected that
12:02:37 10 to Judge Vilardo, and your time to do that has now
12:02:40 11 expired, so that order stands.

12:02:42 12 MR. GREEN: But, your Honor --

12:02:43 13 MAGISTRATE JUDGE MCCARTHY: Mr. Green, just
12:02:44 14 a second, please. If you're going to tell me that you
12:02:47 15 did object, maybe I missed it. But, in any event, my
12:02:52 16 view of the world is that Moog needs information from
12:02:55 17 Defendants before it can identify the trade secrets at
12:02:59 18 issue in this case. And Defendants are saying, well, we
12:03:04 19 can't, you know, we should put a hold on all that
12:03:07 20 because it may be incriminating, and we have to wait
12:03:11 21 until the criminal proceeding is concluded. Those are
12:03:14 22 two kind of irreconcilable considerations that I'll have
12:03:22 23 to wrestle with. Mr. Green, what did you want to say?

12:03:25 24 MR. GREEN: Your Honor, I just wanted to say
12:03:28 25 that I believe that the briefing on the motion to stay

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

12:03:32 2 will satisfy you in terms of the chicken or the egg
12:03:36 3 situation. I mean, first of all, we know that Moog has
12:03:39 4 already identified the files that Ms. Kim virtually
12:03:46 5 downloaded, and yet they haven't identified any of them
12:03:50 6 as trade secrets.

12:03:51 7 And, second, they claim or their expert has
12:03:54 8 claimed, and in one of their filings, that Mr.
12:03:58 9 Pilkington downloaded his entire Moog laptop. They have
12:04:04 10 that laptop. So, if there is -- if there are any trade
12:04:11 11 secrets on that laptop or in the files that they've
12:04:15 12 identified as having been downloaded by Ms. Kim, they
12:04:19 13 can identify any of those as trade secrets right now.
12:04:22 14 So, we go into this further in our motion for the stay.
12:04:31 15 But it's simply not true that they can't make this
12:04:37 16 determination right now.

12:04:39 17 MAGISTRATE JUDGE MCCARTHY: All right.
12:04:40 18 Well, I will, you know, I'll study all of the
12:04:44 19 submissions regarding the stay and be ready to hit the
12:04:49 20 ground running on September 12th. With respect to what
12:04:52 21 Ms. Yip has just argued, I may get to that sooner, I may
12:04:56 22 not. I'll just see how things go. Okay?

12:04:59 23 Is there anything else that I need to
12:05:01 24 address today, counsel?

12:05:06 25 MS. ANDOH: Nothing on behalf of Plaintiffs.

1 MOOG, INC. VS. SKYRYSE, INC. ET AL.

12:05:08 2 MR. LUMISH: Not for Skyryse, your Honor.

12:05:09 3 MAGISTRATE JUDGE MCCARTHY: Mr. Green?

12:05:10 4 MR. GREEN: No, not right now, your Honor.

12:05:15 5 MAGISTRATE JUDGE MCCARTHY: Mr. Green, enjoy

12:05:17 6 your vacation. Don't think about this case. I hope

12:05:19 7 you'll be on a beach.

12:05:22 8 MR. GREEN: It will hard not to think about

12:05:25 9 the case, but I will try.

12:05:26 10 MAGISTRATE JUDGE MCCARTHY: Okay. I will,

12:05:28 11 we will reconvene in a couple of weeks and we'll see

12:05:32 12 where we go. Thank you all.

12:05:35 13 MR. LUMISH: Thank you, your Honor.

12:05:36 14 MR. GREEN: Thank you.

12:05:37 15 MS. ANDOH: Thank you, your Honor.

16 * * *

17 CERTIFICATE OF REPORTER

18

19 I certify that the foregoing is a correct transcript
20 of the record to the best of my ability of proceedings
21 transcribed from the audio in the above-entitled matter.

22

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